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No. [redacted] 165

Supreme Court of the United States.

OCTOBER TERM, 1911.

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IN THE MATTER OF THE PETITION OF

ALBERT B. CAMERON

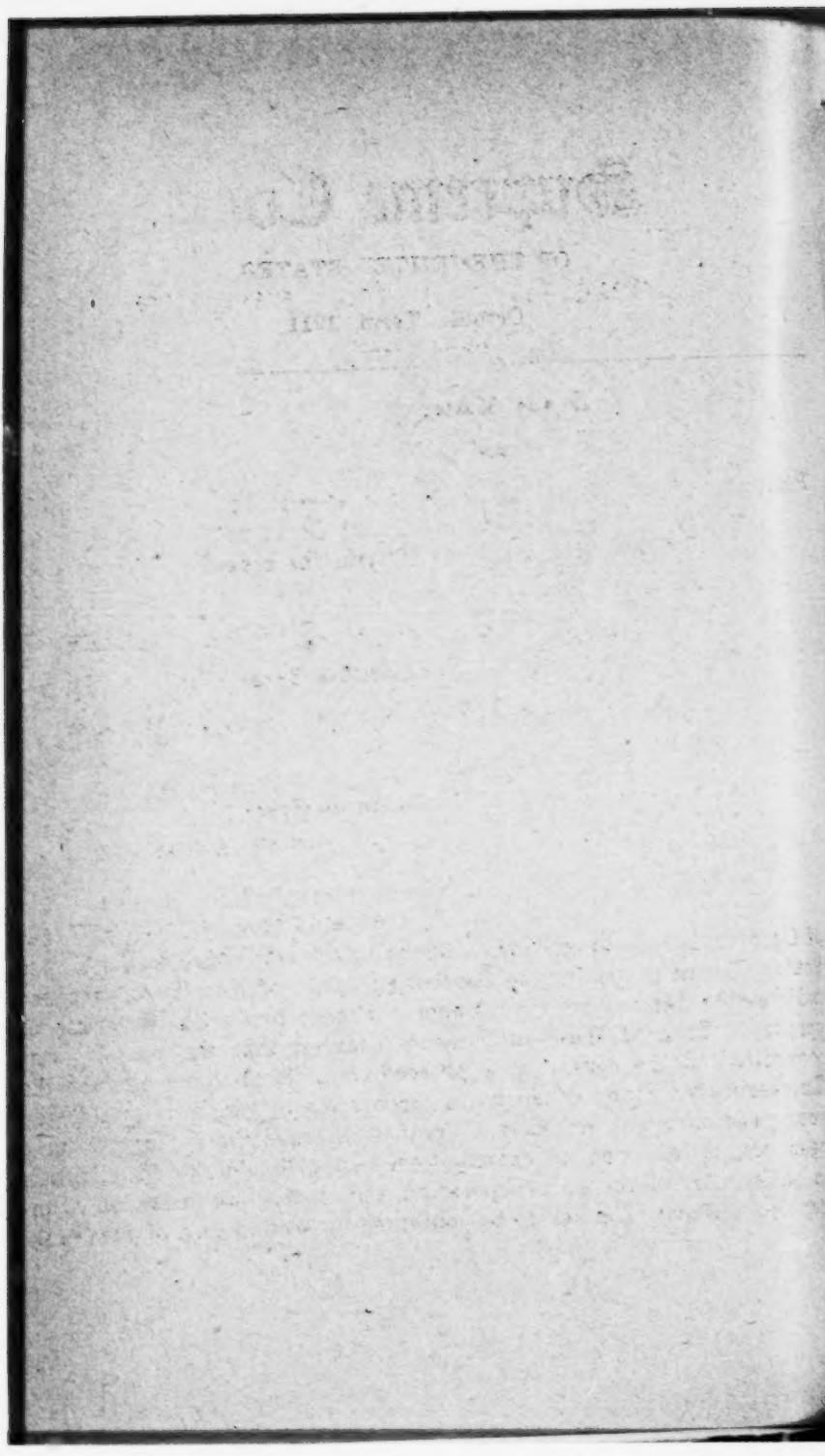
FOR A WRIT OF CERTIORARI, DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE ENTITLED ALBERT B. CAMERON, PLAINTIFF-IN-ERROR,

against

UNITED STATES, DEFENDANT-IN-ERROR.

Petition for Writ of Certiorari

HOWARD S. GANS,
Counsel for Petitioner,
27 William Street,
New York City.



Supreme Court

OF THE UNITED STATES.

October Term, 1911.

In the Matter

of the

Petition of ALBERT B. CAMERON for a writ of Certiorari, directed to the Circuit Court of Appeals for the Second Circuit in the case entitled

ALBERT B. CAMERON,
Plaintiff-in-Error,

against

UNITED STATES,
Defendant-in-Error.

The petition of Albert B. Cameron respectfully shows:

On the third day of August, 1910, and the twenty-fourth da of October, 1910, respectively, the Grand Jury empaneled in the Unite States Circuit Court for the Southern District of New York, returne indictments against your petitioner charging him with the crime o perjury. Each of these indictments charged that the perjury wa committed in the course of a proceeding in bankruptcy against th Knickerbocker Piano Company, a corporation of which it was allege your petitioner was an officer. The first charged the perjury to hav been committed upon an examination held prior to the adjudicatio in bankruptcy of the said corporation, pursuant to an order made un der the authority claimed to be conferred by section 21-a of the Bank

ruptcy Act. The second charged the perjury to have been committed upon an examination had before a Referee subsequent to the adjudication.

On the 9th day of November, 1910, these indictments were consolidated and on the same day your petitioner was arrainged and pleaded not guilty thereto; on the 10th day of the same month the issues were brought on for trial, in the Circuit Court for the Southern District of New York, and on the 11th a verdict of guilty was rendered and your petitioner was sentenced to imprisonment for one year in the New York County Penitentiary.

On the 23rd day of November, 1910 a writ of error for the review of the said judgment of conviction by the Circuit Court of Appeals of the Second Circuit was duly allowed, and your petitioner was admitted to bail pending its determination. On the 11th day of December, 1911, the said Circuit Court of Appeals rendered its decision affirming the said judgment, and on the 19th day of December, 1911, it made its order staying its mandate until the determination of this application, or of the hearing on the merits in the event that the writ herein applied for shall issue.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeal, and the same is marked Exhibit "A".

Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, for the reasons following:

I. Your petitioner has been convicted for the commission of acts which, under decisions of the Circuit Court of Appeals of the Third Circuit and other Federal Courts, do not constitute an offense.

The first indictment charged that your petitioner had committed perjury in the course of testimony given upon an examination prior to the adjudication in bankruptcy, under the pretended authority of section 21-a of the Bankruptcy Act.

Upon the trial and before the said Circuit Court of Appeals, it was urged in behalf of your petitioner that no evidence should be received in support of the charge contained in said first indictment, because

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the examination upon which your petitioner's evidence was given was unauthorized by law and was null and void in that the said provisions of the Bankruptcy Act did not authorize an examination prior to the adjudication of bankruptcy of the alleged bankrupt.

This contention was founded, as your petitioner is advised and believes, upon decisions of the Circuit Court of Appeals of the Third Circuit and of the District Courts in Massachusetts, and Alabama,

(*Skubinsky* v. *Bodek*, 172 Fed., 332, C. C. A., Third Circuit; *In re Thompson*, 179 Fed., 874, Penn., D. C.; *In re Davidson*, 158 Fed., 678, Mass., D. C.; *In re Crenshaw*, 155 Fed., 271, Ala., D. C.)

wherein, as your petitioner is informed and believes it has been determined that there was no authority for such examination prior to the adjudication and that no persecution for perjury could be maintained by reason of testimony given upon such an examination.

The contention was overruled both by the Circuit Court and by the Circuit Court of Appeals, and thereby, as your petitioner is informed and believes, there is presented that conflict of decisions between Circuit Courts of Appeals in the several Circuits, which have heretofore moved this honorable Court to issue its writ of certiorari to the end that the administration of the law might be uniform throughout the United States in its Courts.

2. There was introduced in evidence against your petitioner testimony given by him under the immunity guaranteed by the provisions of Section 860 of the Revised Statutes, and his conviction has been secured by means of a violation of the security thus conferred upon him.

Upon the trial the government offered and was permitted to introduce in evidence the entire stenographic record of the evidence given by your petitioner on the several proceedings upon which the indictments were founded, and was permitted to read from each of the said records not only that portion thereof which was assigned as perjury but also such further portions of each of the said records as tended in the opinion of the prosecuting officer to fortify the government's case.

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Your petitioner was charged with having sworn perjuriously in regard to two matters and two matters only, which were in substance as follows:

1. That shortly prior to the institution of the proceeding in bankruptcy, your petitioner had sold pianos to one William C. Smith, the petitioner in bankruptcy against the said corporation, and to that end had had a conversation with him.

2. That he was ignorant of the address of the said Smith and had not been able to obtain it.

The first of these matters was assigned in both indictments, and he was charged with having testified perjuriously with respect to both before the special commissioner and before the referee. The second, *i. e.*, that he was ignorant of the address—was assignd only in the second indictment, and it was *not* charged that he had testified falsely with respect thereto in the proceeding before the special commissioner.

Nevertheless, the government was permitted to read in evidence against your petitioner, testimony given by him in the said proceeding before the Special Examiner in August, 1909, relative to his knowledge of the said Smith's address, notwithstanding the objection of your petitioner's counsel that he was immune from the use of the said evidence by virtue of the provisions of sections 860 of the revised statutes.

Moreover, other evidence given by your petitioner in each of the said proceedings was read in evidence over like objection. There was no charge in either of the said indictments that your petitioner had testified falsely in relation to the extent of his acquaintance with the said Smith, to the delivery of the pianos to the said Smith, or as to any steps taken with respect thereto, or with respect to the disposition made of the pianos by the said Smith. Nevertheless, the government was permitted to read in evidence testimony given by your petitioner in the said bankruptcy proceeding relative to the said matters, for the purpose, as was announced by the learned Judge who presided at the trial, of throwing light upon the intent with which your petitioner had testified to the matter charged to be perjurious.

These rulings have been sustained by the Circuit Court of Appeals.

The testimony of your petitioner given in said bankruptcy pro-

ceeding, other than that charged to be perjurious, was thus used against your petitioner for the purpose of his conviction, in disregard of the promise conveyed by the Congress of the United States that if he would testify and waive his constitutional right to silence no testimony so given would be permitted to be used against him.

Your petitioner is advised and verily believes that the question thus presented is of wide and far-reaching importance, that the right which your petitioner had asserted is that which he had accepted as a substitute for his constitutional right of complete silence, and that the disregard of that right presents a question closely akin to an invasion of a constitutional right.

Your petitioner is advised and verily believes that provisions similar to that under which he asserts his right are contained in the Bankruptcy Act and in other statutes of the United States, and that it is of grave and general importance that witnesses called upon to testify under the provisions of such statutes may be advised how the statutory protection is to be construed and what measure of protection it guarantees.

3. Your petitioner verily believes that to his prejudice other errors were committed upon the trial, that the evidence properly received against him was insufficient to justify the submission of the charge to the jury, and that by reason thereof, he has been unjustly convicted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled—"Albert B. Cameron, Plaintiff-in-Error, against United States, Defendant-in-Error," to the end that the said case may be reviewed and determined by this court as provided in section 6 of the Act of Congress, entitled "An act to establish Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and

that the said judgment of the said Circuit Court of Apeals in the said case, and every part thereof, may be reversed by this honorable Court.

And thus your petitioner will ever pray.

Dated, New York, January 8th, 1912.

ALBERT B. CAMERON,
Petitioner.

HOWARD S. GANS.
Counsel.

State of New York,
County of New York,
Southern District of New York, } ss.:

ALBERT B. CAMERON, being duly sworn deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to betrue.

ALBERT B. CAMERON.

Sworn to before me this
8th day of January, 1912.

B. BENJ. SCHIFF,
[SEAL] Notary Public, Kings County.
Certificate filed in N. Y. County.

No. [illegible]

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

IN THE MATTER

of

The Petition of ALBERT E. PATTERSON [illegible]

GERRETSEN GARRISON,

Plaintiff-in-Error,

against

UNITED STATES,

Defendant-in-Error.

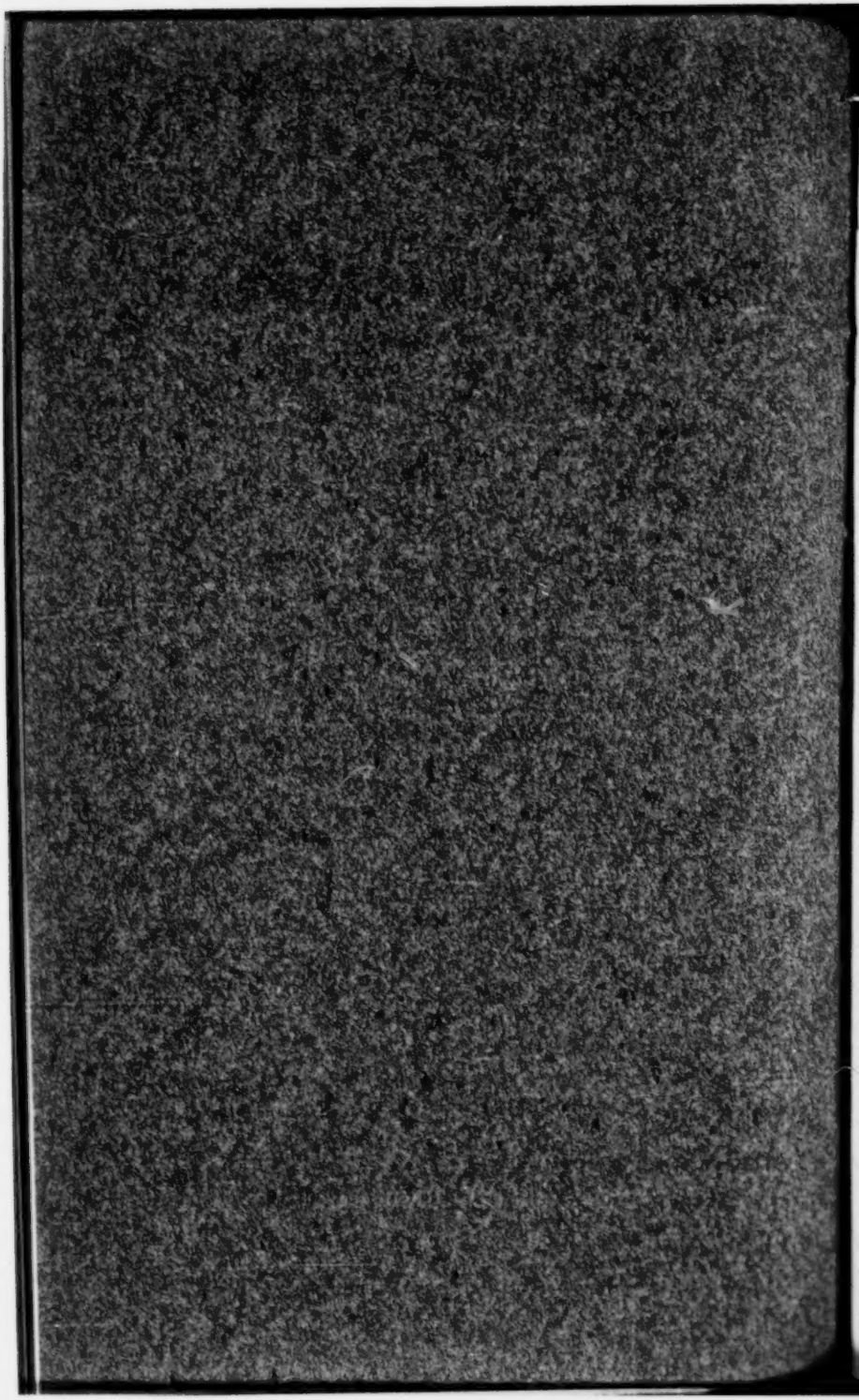
BRIEF IN SUPPORT OF PETITION FOR WRIT

HOWARD S. GANS,

Counsel for Petitioner.

[illegible]

Howard Gans, Jr., Otto Peltzer, 60 Church St., New York.



Supreme Court of the United States,

October Term, 1911.

IN THE MATTER *of* The Petition of ALBERT B. CAMERON for a Writ of Certiorari, directed to the Circuit Court of Appeals for the Second Circuit in the case of ALBERT B. CAMERON, Plaintiff-in-error, *against* UNITED STATES, Defendant-in-error.	Brief in Support of the Petition.

The Facts.

On the eleventh day of November, 1910, the petitioner was convicted of the crime of perjury committed in the course of proceedings in bankruptcy. The conviction was based upon two indictments filed and returned respectively the third day of August, and the twenty-fourth day of October, 1910; and consolidated for the purpose of trial on the ninth day of November, 1910.

The perjury charge was based upon testimony given by the petitioner in the course of proceedings in bankruptcy against the Knickerbocker Piano Company, of which he was an officer. The *first* indictment was based upon testimony given before a Special Examiner and Commissioner

on a hearing held prior to the adjudication in bankruptcy, under an order purporting to be authorized by the provisions of section 21-a of the act (fols. 20 and 21). The *second* indictment was based upon testimony given by the petitioner upon a hearing had before the Referee in Bankruptcy subsequent to the adjudication (fols. 38, 39). The perjury charged in the *first* indictment consisted of testimony to the effect that the petitioner shortly prior to the institution of the bankruptcy proceeding had had a conversation with one William C. Smith, the petitioning creditor in those proceedings, concerning the sale to Smith of certain pianos, and that as the result of that conversation he had sold Smith eight pianos for the sum of $668 (fols. 27-29). The perjury charged in the *second* indictment consisted in testimony to the effect that he had had a conversation with the said Smith in regard to the purchase of pianos by Smith; and to the *further* effect that the petitioner had never known Smith's address and had not been able to obtain it (fols. 43, 44).

It was established without question that the testimony alleged to be perjurious was in fact given. The issue litigated was as to the falsity of the testimony and its wilfulness. The evidence properly received against the petitioner left the issues as to several if not as to all the assignments of perjury, standing as oath against oath without that additional evidence to weigh against the truth of the petitioner's original testimony which the law requires to permit a conviction upon a charge of perjury; and there were a number of rulings upon the trial, which it was urged in the Circuit Court of Appeals, were erroneous and prejudicial to the defendant.

Of these, however, there are only two involving questions of that degree of general importance which under the rulings of this Court warrant an application for this writ of review:

The *first* of these involves a conflict between the Circuit Court of Appeals of the Second Circuit and the Circuit Court of Appeals of the Third Circuit, upon the question of the power under the provisions of section 21-a of the Bankruptcy Act to examine witnesses prior to an adjudication in bankruptcy; and thus presents for authoritative determination a highly important question arising every day throughout the Union in the bankruptcy courts.

The *second* involves the interpretation of section 860 of the Revised Statutes and of the similar statutes still in force, which are designed to induce witnesses to waive their constitutional right to silence in the face of incriminatory possibilities in their testimony, in consideration of a guarantee that the testimony thus given shall not be subsequently used against them in a criminal case.

It is the claim of the petitioner that the testimony given by him under such a guarantee has been used for the purpose of his incrimination; that the construction given to the statute by the Circuit Court of Appeals, deprives him of that safeguard on the faith of which his testimony was given, and thus involves in effect a breach of faith upon the part of the government, and an invasion of a right closely akin to the constitutional right to be immune from compulsory self-incrimination.

These two points alone it is our purpose to press upon the Court:

I.

The decision of the Circuit Court of Appeals in the case at bar involves a conflict with the Circuit Court of Appeals of the Third Circuit upon a question of general importance, arising daily in the practice of the bankruptcy courts, and demanding authoritative determination.

As has been stated above, the first indictment upon which the petitioner was tried, charged the perjury to have been committed upon an examination held prior to an adjudication in bankruptcy, under an order based upon the supposed authority of section 21-a of the Bankruptcy Act (fols. 20-23). As soon as evidence was offered in support of this indictment, counsel for the defendant objected thereto on the ground that that section of the act authorized an examination only after an adjudication; that an examination prior to an adjudication was wholly unauthorized by law; that it was an extra-judicial proceeding, and that testimony given in that proceeding could not be the basis of a prosecution.

The objection appears at folio 57 of the record as follows:

> "Mr. McMANUS—That is objected to as irrelevant, immaterial and incompetent, and particularly on the ground that the Court has not the authority at that stage of the proceeding to make an order for the examination under section 21-a, it not appearing that at that time the adjudication in bankruptcy had been had, and I will quote further—I read from just that part which is important—this proceeding

is one not authorized by law, and I submit that this testimony cannot be admitted.

"The COURT—Unless my attention is called to some decision of this Circuit to the contrary, I will overrule the objection.

"Objection overruled. Exception by defendant."

And the error involved in the admission of this evidence was duly assigned (Assignment of Errors No. 1, fol. 279).

The point made is sustained by the rulings of the Circuit Court of Appeals of the Third Circuit, and by rulings of the District Courts in Pennsylvania, Massachusetts and Alabama founded thereon.

**Skubinsky* vs. *Bodek*, 172 Fed., 332 (CCA, Third Circuit).
In re Thompson, 179 Fed., 874 (Penn. D. C.)
In re Davidson, 158 Fed., 678 (Mass. D. C.)
In re Crenshaw, 155 Fed., 271 (Ala. D. C.).

These decisions the Circuit Court of Appeals of the Second Circuit has overruled in its determination of the case at bar, saying:

"The defendant's contention that the proceeding before the Commissioner prior to the adjudication was unauthorized is not well taken. It is well settled in the Southern District of New York, at least, that such hearings are valid.

"*In re Fleisher*, 151 Fed., 81;
"*In re Bick*, 155 Fed., 908;
"*Wechsler* vs. *United States*, 158 Fed., 579.

"*Skubinsky* vs. *Bodek*, 172 Fed., 332, holds to the contrary, but we think the dissenting opinion of Judge Buffington correctly interprets the law."

*For the convenience of the Court, we append as an addendum to this brief the material portions of this decision.

There is thus presented a situation whereby it is permissible to hold such examinations in the Second Circuit and impermissible to hold them in the Third Circuit or in the First or Fifth Circuits, while in the five remaining Circuits the question still remains undetermined.

Manifestly, the question is of great and far-reaching importance; and unquestionably much is to be said in support of either view. On the one hand, it is undeniable that the power to examine before adjudication is a powerful instrument for the discovery and preservation of assets and unearthing of fraud, and it may well be argued that to strip the bankruptcy courts of this power will tend to emasculate the act and to minimize its efficiency in securing the equal distribution of assets among the creditors which it is designed to effectuate. On the other hand, it is equally apparent that the power thus claimed is a dangerous one, and furnishes opportunities for inquisitorial investigation which may readily be employed for oppressive purposes. Upon a mere *ex parte* application setting forth only those bare jurisdictional facts which enable a Court of bankrutcy to take cognizance of a case, and before any issue is tendered or tried it permits an almost unrestrained inquiry into the intimate business affairs and dealings, not only of the alleged bankrupt, but of all the persons who may be claimed to have any knowledge of his affairs or to have had any dealings with him. And in a situation where it is yet undetermined whether the proceeding will lie, it subjects not only the alleged bankrupt but all other persons to the possibility of the broadest and most searching investigation into their private affairs without even that safeguard which is afforded by the protection of counsel and the right to restrict the inquiry to specific channels defined by pleadings. It is a proceeding which offers dangerous and seductive opportunities to entrap witnesses, and to induce them through inadvertence or through ignorance of their legal rights into self-incrimination; and it

involves the exercise of power which, so far as we know, is conferred on no other tribunal save a Grand Jury, and even there is safeguarded to an extent, at least, by the obligation of the prosecuting officer to see that no undue advantage is taken of the distress or ignorance of the witnesses.

It is certainly reasonable to contend that such a power will not be deemed to have been conferred in the absence of language that leaves room for no other construction and that the decision of the Circuit Court of Appeals of the Third Circuit that such power has not been conferred should be upheld.

However this may be, the question is clearly one of far-reaching importance. If the power has been conferred, the bankruptcy courts of the Third Circuit should not be deprived of the right to exercise it; if it has not been conferred, it is monstrous that it should be exercised in any of the Circuits. Pre-eminently, we submit it is a question upon which there should be uniformity throughout the courts of the United States.

II.

The decision of the Circuit Court of Appeals involves a construction of an immunity statute whereby the protection accorded by such statutes is radically limited, and thus presents a question of general and far-reaching importance akin to that which is presented by the denial of a claim of constitutional right.

The testimony, by the use of which the defendant's conviction was secured, was given at a time when section

860 of the Revised Statutes was in force, and it is unquestioned that the provisions of that statute were applicable to it, and that the petitioner was entitled to the immunity which that statute guaranteed.

The statute provided as follows:

> "Sec. 860. *Pleadings, disclosures, etc., not to be used in criminal proceedings.* No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It was conceded, of course, that this statute did not confer upon the petitioner immunity from prosecution for perjury committed in the course of his testimony, and that it did not prevent the use of so much of the testimony given by him as was assigned to be perjurious, for the purpose of proving that such testimony had in fact been given. It was and is contended by the petitioner, however, that the statute did prevent the use of any testimony other than that assigned as perjurious for any purpose whatsoever, and that a defendant charged with perjury is guaranteed against the use of testimony other than that assigned as perjurious as completely as he is against the use of any of the testimony for the purpose of convicting him of a crime other than perjury.

This contention was urged throughout the trial at every point where such testimony was offered, and was overruled upon the general ground that the prosecuting officer was entitled to show all the circumstances sur-

rounding the commission of the alleged perjury (fol. 77), and upon the specific ground that through testimony other than that assigned as perjurious it was entitled to establish the criminal intent (fol. 95).

The course adopted at the trial was to permit the prosecution to introduce in evidence over the petitioner's objection and exception the entire record of the testimony given by him in both proceedings (fols. 65 and 71), and then to permit the prosecution to read from the testimony given in the proceedings, over like objection and exception, such excerpts as it deemed proper (fols. 74 *et seq.* to 100).

The prosecuting attorney initiated his introduction of evidence of this character by reading from Exhibit No. 5 (fol. 72), which was the testimony given before the Special Commissioner and Examiner (fols. 64-66). The indictment based upon that testimony contained no assignment charging that any perjury had been committed with respect to the petitioner's knowledge of the address of W. C. Smith (fols. 27 and 28); while the second indictment, based upon the testimony given before the Referee, did contain such an assignment (fol. 43). Yet the prosecuting attorney was permitted to read from the testimony given before the Commissioner the following:

> "*Q.* Where is his (referring to W. C. Smith) place of business?
>
> "*A.* He is not in business.
>
> "*Q.* Who is he?
>
> "*A.* Why, an acquaintance of mine.
>
> "*Q. Where does he live?*
>
> "*A. On St. Nicholas avenue. I don't recall the address.*
>
> "*Q. What number?*
>
> "*A. I don't remember.*
>
> "*Q. Between what streets?*
>
> "*A. Above One Hundred and Twenty-fifth.*

"*Q. Is it an apartment or a private house?*

"*A. Why, I think just a furnished room or rooms*" (fol. 74).

Manifestly, this testimony tended strongly to the defendant's prejudice upon the issue raised by the second indictment. Clearly, it tended to indicate that he had some knowledge of Smith's address; and from it the jury could not but conclude that when subsequently he testified that he did not know Smith's address and had not been able to ascertain it, he was testifying falsely. Objection to the testimony was seasonably taken in the following form:

> "I object to this as immaterial and not within the issues. There is no allegation in the indictment, or the assignment of perjury, as to the alleged address of William C. Smith, and in the proceeding before the Commissioner——" (fol. 77).

To this the prosecuting officer replied:

> "I am reading so the jury will get some sort of a comprehensive idea as to what the man testified to. This is the beginning of this alleged transaction with William C. Smith" (fol. 77).

And upon this statement of the purpose of the testimony, the objection was overruled (fol. 78), and the prosecution was permitted to read from the same source the following (fols. 78, 79):

> "*Q.* How long have you known him?
>
> "*A.* Oh, three or four years.
>
> "*Q.* Do you know whether he is employed by anybody?
>
> "*A.* Yes, sir, but I don't know where.
>
> "*Q.* You haven't any idea in what capacity he is employed?
>
> "*A.* No.

"*Q.* How often do you meet him?

"*A.* Not very often.

"*Q.* How often did you meet him before this last transaction?

"*A.* Oh, two or three times.

"*Q.* How long do you know him

"*A.* Three or four years, I think."

At this point another objection was interposed on the same ground, but the prosecution was permitted to proceed with its quotation as follows (fols. 79, 80):

"*Q.* Where did you first meet him?

"*A.* New York.

"*Q.* Where?

"*A.* I don't recall that.

"*Q.* Do you know anybody else other than yourself who knows Mr. Smith?

"*A.* He has a number of friends.

"*Q.* Do you know of anybody?

"*A.* My brothers.

"*Q.* Outside of your family?

"*A.* No.

"*Q.* Is he related to you?

"*A.* No.

"*Q.* Is he related to any member of your family?

"*A.* No.

"*Q. Do you know how he can be located?*

"*A. Why, yes, I could get hold of him.*

"*Q. How could you get hold of him to-day?*

"*A. I'd go and ask my brother.*

"*Q. You think he could give you the address?*

"*A. Yes, sir, I think so.*"

The prosecution thus was permitted to read in evidence testimony given before the Commissioner which had no relevance to any assignment of perjury alleged to have

been committed in that proceeding, and which tended to establish that the defendant had sworn falsely in the *subsequent* proceeding, both when he testified that he *did not* know William C. Smith's address and that *he had not been able* to procure it.

If the defendant had been tried on the second indictment alone, it would have been too clear to admit of argument that the admission of the testimony given in this prior proceeding was in violation of the guaranty under which he had given that testimony and an invasion of his rights; and it is submitted that the matter is rendered no less clear by the fact that he was also on trial under the first indictment for alleged perjury relating to an entirely different matter.

In the opinion of the Circuit Court of Appeals it is said that the claim of the petitioner, that testimony given in one proceeding was used to establish the falsity of testimony given in the other, was not borne out by the record; but it is submitted that in coming to this conclusion the learned Court must either have overlooked the testimony above referred to or have failed entirely to appreciate its relation to the charge contained in the other indictment.

A part of this evidence the learned Court justifies upon the theory that it was admissible in identifying the W. C. Smith subsequently referred to in the testimony charged to be perjurious as the W. C. Smith referred to in the indictment; and it is held that not merely the testimony charged to be perjurious was admissible, but all testimony offered for the purpose of establishing such identifying circumstances was likewise admissible.

To quote the language of the learned Court:

> "Where perjury is charged, the alleged perjurious testimony must from the nature of the case, be produced together with such other parts of the

statement of the witness as are necessary to remove any doubt or ambiguity which might exist as to the time, the place and the individuals referred to by him.

"It was therefore proper under the second indictment to read such portions as were necessary to identify the Smith referred to as the person who bought the pianos and whose address was alleged by the defendant to be unknown to him.

"The parts introduced were the alleged false statements and such other portions as were essential for this identification and tended to show that the witness fully understood the nature of his testimony and that it related to William C. Smith of St. Nicholas avenue and to the property of the bankrupt piano company."

The soundness of this principle is challenged by the petitioner, and it is contended that ambiguities of this character are, under the statute, to be removed by extrinsic evidence and not by the defendant's self-incriminatory admissions given under the guaranty that they should not be used against him.

But even if the principle were to be conceded, it would seem manifest that it could not justify the admission of this evidence. The William C. Smith referred to in the indictment is identified therein as the petitioner in bankruptcy against the Knickerbocker Piano Company (fol. 26), and there is no attempt therein to identify him by reference to his address or any other circumstance. If the rule laid down by the learned Circuit Court of Appeals be correct it would have been admissible to read in evidence any testimony of the petitioner to the effect that the W. C. Smith referred to by him was the petitioner in bankruptcy proceeding; but it is impossible to discover in what way the petitioner's testimony that the W. C. Smith

referred to 'was not in business,' that 'he was an acquaintance of the petitioner,' that 'he lived on St. Nicholas avenue at an unknown number above One Hundred and Twenty-fifth street in a furnished room,' and that 'the petitioner had known him three or four years' and 'did not know where he was employed, but that the petitioner's brother knew him and that the petitioner could obtain his address from his brother,' tended in any way to identify the W. C. Smith to whom he was referring, with the W. C. Smith referred to in the indictment.

Moreover, it is clear that the testimony was not introduced for any such purpose. Had such a purpose been claimed all doubt might readily have been obviated by an admission on the part of the defendant that the W. C. Smith referred to in his testimony was the W. C. Smith who was the petitioning creditor in the bankruptcy proceeding; and, as no issue was raised upon that point throughout the trial, there is no reason to doubt that such an admission would have been forthcoming. But on the contrary, the purposes was declared to be "to give a comprehensive idea of what that man testified to" (fol. 77).

Clearly, if the solemn guaranty of an immunity statute can thus be evaded, and if by such process of construction the immunity offered by the Government, as an inducement for a witness to forego his constitutional privilege of silence, can be nullified, the promise contained in such a statute is of but slight value; and those who are called upon to testify under circumstances where such statutes apply will be ill-advised unless they disregard the statute and rely solely upon the complete protection with which the constitution hedges them about.

The foregoing is but a small part of the testimony thus admitted in violation of the guaranties of the statute. It has been emphasized because it presents the clear cut case

of testimony given in *one* proceeding tending to establish a material fact necessary to the conviction of the witness for perjury committed in *another* proceeding. But the same violation of the petitioner's rights is manifest throughout the reading of the testimony given by him in the two proceedings. No care was manifested by the prosecution nor enforced by the Trial Court to limit the reading of that testimony within its proper bounds; that is, to establish the fact that the matter assigned as perjurious had actually been testified to; and no effort on the part of the defendant's counsel served to keep it within those bounds. This is manifest throughout; but a second striking example of it may well be cited.

As has been pointed out above the charges of perjury in the second indictment were confined to the question of the sale of the pianos, the conversation leading up to the sale and the petitioner's knowledge of Smith's address and his inability to obtain it (fols. 43-45). There was *no* assignment of perjury with respect to the delivery of the pianos or to any acts leading up to it. Yet over the objection of the defendant's counsel, and with the specific statement from the Court to the effect that "*anything that tends to throw light on the intent is admissible*" (fol. 95), the prosecuting officer was permitted to read the following:

> "*Q.* Now, did you ever do any business with Smith before?
>
> "*A.* I never sold him any pianos before.
>
> "*Q.* Did you ever have any business with him before; do any?
>
> "*A.* No, not business.
>
> "*Q.* He is not in the piano business?
>
> "*A.* No (fol. 81).
>
> "*Q.* Did Smith take the pianos away?
>
> "*A.* They were delivered to his order; I don't know (fol. 96).
>
> "*Q.* Who delivered them?

"A. I don't know—our carman, I think (fol. 96).

"Q. Who gave the orders to the carman?

"A. I don't know whether he got a written order or I mentioned it to him.

"Q. Didn't he have the transaction with Smith?

"A. Yes.

"Q. Was there anybody else but you?

"A. Yes, sir.

"Q. Didn't you give the order to the car man?

"A. I don't know whether I mentioned these goods would be going out at such time.

"Q. Somebody must have given the order to the car man to take them out of the place; who was it?

"A. I mentioned those goods would be ready at such a time and they were afterwards moved away from the factory.

"Q. Where did they go?

"A. I don't know.

"Q. Who is the car man?

"A. Hugh Kiernan.

"Q. You didn't tell him where to take those pianos?

"A. I may have intimated where I thought it would be.

"Q. Where did you think?

"A. I thought they might be going temporarily into storage, for instance.

"Q. Where, for instance, did you think temporarily they would go?

"A. There was a number of storage warehouses.

"Q. Didn't you know as a matter of fact where those pianos went to and where they are to-day?

"A. No, I don't know.

"Q. Give us your hearsay knowledge as to where they went?

"A. I think they would be at a storage warehouse up there near the Harlem River.

"*Q.* Give us the name?

"*A.* The Harlem Terminal, I think.

"*Q.* Have they been removed by Mr. Smith since the filing of the petition?

"*A.* I don't know.

"*Q.* Have you heard?

"*A.* No.

"*Q.* Did you enter up on your book the sales to Smith?

"*A.* No, I didn't have time to do that.

"*Q.* What did you do with the money you got from Smith?

"*A.* The money I got for those pianos went partly for payroll that week and the balance for counsel fees.

"*Q.* Have you a piano register?

"*A.* Yes, sir.

"*Q.* Where is it?

"*A.* I don't know unless it is here.

"*Q.* Would you know it if you saw it?

"*A.* (Looking) I don't see it here."

Manifestly nothing could be more clearly prejudicial, or could tend more strongly to establish the falsity and wilfulness of the alleged prejurious testimony as to the sale and as to the conversations leading up to it, and hence we submit nothing could be more clearly inadmissible under the guaranty of the statute. For manifestly the statute must be read in the light of its history as an attempt to supply a protection which would be coextensive with that guaranteed by the constitutional prohibition of compulsory self-incrimination. And since the earliest authoritative interpretation of that constitutional provision establishes that it protected the witness not only from revealing the facts constituting the criminal act but from revealing any fact, however slight, which tended to furnish a link in the chain of his conviction (1 Burr's Trial, 243;

Ballman *vs.* Fagan, 200 U. S., 186, 195); it is clear that a statute which was designed to afford a like immunity by compelling testimony and thereafter prohibiting its use, must be construed as prohibiting the use of testimony tending to establish intent as well as the use of that which tends to establish the more material elements of the crime.

With all respect, therefore, to the learned Circuit Court of Appeals, we submit that the ruling was error, and that a conviction based upon such a ruling ought not to be permitted to stand. We submit that it is no answer to the contention that the guilt of the defendant is deemed by the Circuit Court of Appeals to be clear; for this Court has too many times insisted that it is far more important that the rights of the individual should be preserved and that statutory or constitutional guaranties should not be ignored than that any particular individual should be convicted.

The question here involved is one of good faith on the part of the Government. In effect the Government has said to the petitioner: If you will testify in the courts and thus refrain from blocking the administration of the law, as you might by insistence upon your constitutional rights, we, the United States of America, will guarantee that your testimony will not be used for your incrimination, save that if it is charged that you have testified falsely you must be prepared to have testimony, which is charged to be false, read in evidence as a basis for the determination of its truth or falsity. This guaranty the petitioner has accepted, as other witnesses are daily accepting similar guaranties under the Bankruptcy Act and other statutes; and, having accepted that guaranty and having waived his constitutional rights to silence, in reliance upon it, he now finds that by a process of judicial construction, the guaranty is held to mean something other than is conveyed by its plain terms, and that not merely is the testimony wherein he is charged to have sworn falsely permitted

to be read against him, but the whole body of his testimony whether given in the same or in another proceeding is allowed to be introduced to establish that what was charged to be false is false and that the falsehood was wilful.

The case of this defendant may not be of great importance, and certainly it is of little moment to the destinies of the nation whether he shall or shall not serve his term of imprisonment on the basis of a conviction thus obtained, but we submit that it is of far-reaching importance that the guaranties of the Government shall be so construed as not to operate as traps and pitfalls for the unwary and that those who testify in the courts by virtue of the Government's guaranty of immunity shall be authoritatively advised that the Government keeps its faith and that they may rely upon the observance of that guaranty to the full measure of its letter and spirit. And in this aspect we conceive that the question presented by the case at bar is of a character which should impell this Court to grant the petitioner's prayer.

Respectfully submitted,

HOWARD S. GANS,
of Counsel for the Petitioner.

Addendum.

Extract from Opinion of Circuit Court of Appeals in the Third Circuit in the case of Skubinsky against Bodek, 172 Fed. Rep., 332, at pages 334, 335:

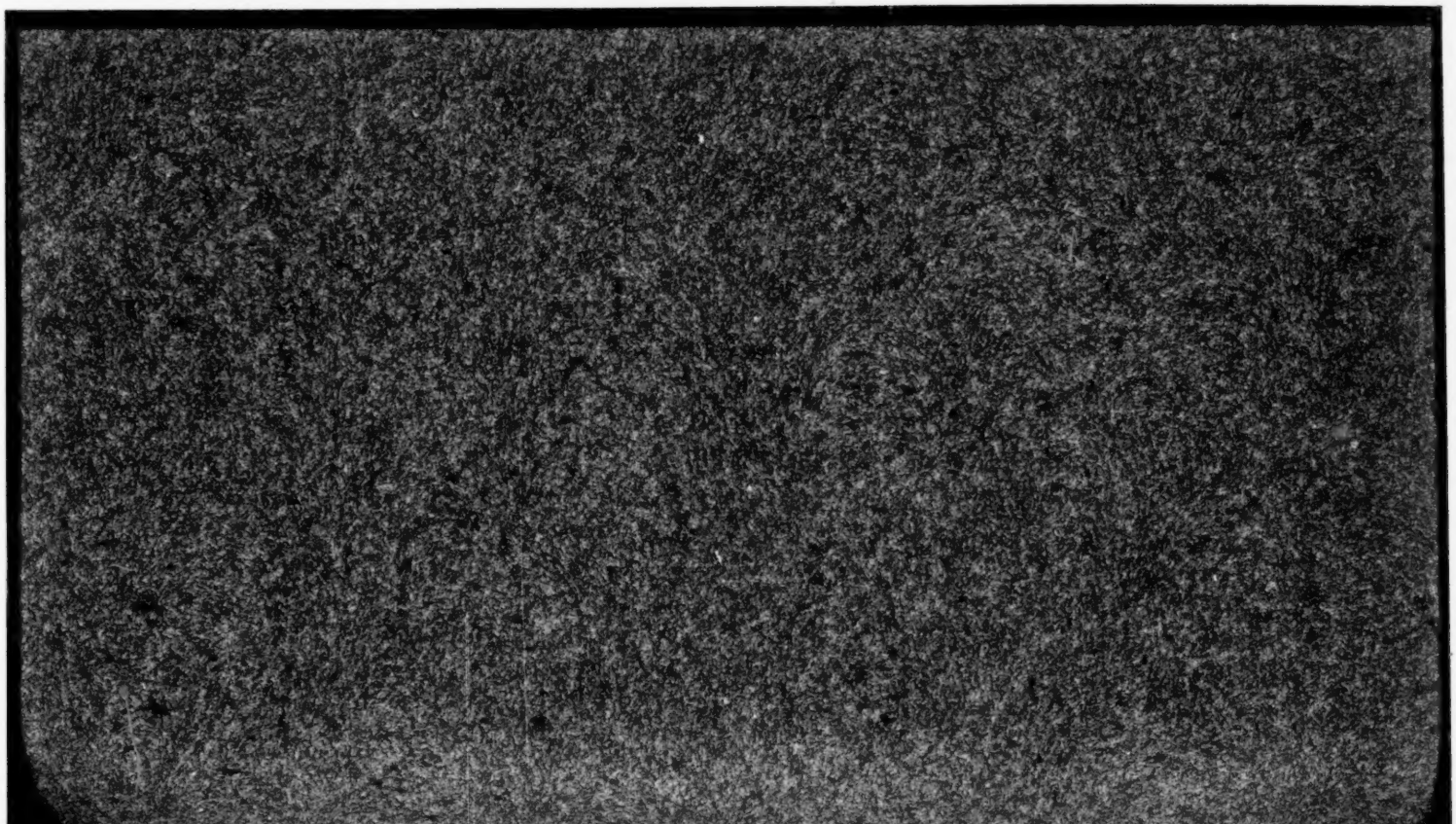
> "It appears from the record that the order complained of was granted before Skubinsky made answer to the petition in involuntary bankruptcy, or in any manner raised an issue, either of law or of fact, with respect to its averments, and six days before the time fixed for the showing of cause why the prayer of that petition should not be granted, and thirteen days before Skubinsky was adjudicated a bankrupt. There are three assignments of error, each of them challenging the legality of the order of special reference. The last reads as follows:
>
> "'That the learned Judge of the District Court erred in granting the special reference before the adjudication of the alleged bankrupt and before his estate was in process of administration.'
>
> "Section 21a of the Bankruptcy Act (Act July 1, 1898, chap. 541, 30 Stat., 552; U. S. Comp. St., 1901, p. 3430, as amended February 5, 1903 (Act February 5, 1903, chap. 187, sec. 7, 32 Stat., 798; U. S. Comp. St. Supp., 1907, p. 1028), provides, among other things, as follows:
>
> "'A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in Court or before a Referee or the Judge of any State Court, to be examined concerning the acts, conduct or property of the bank-

rupt whose estate is in process of administration under this act.'

"The authority conferred by this section to grant a reference for the purpose of throwing light on 'the acts, conduct or property of the bankrupt is limited to the case of one "whose estate is in process of administration under this act."' While by virtue of section 1 of the act the term 'bankrupt' may include a person against whom an involuntary petition has been filed as well as one who has been adjudged a bankrupt, section 21 contains the significant and unambiguous words 'bankrupt whose estate is in process of administration under this act.' We do not think that the appointment and qualification of the Receiver and his exercise of official functions before the adjudication of Skubinsky as a bankrupt and, indeed, before the return of the rule to show cause or the presentation of any issue of law or fact in the case, can be tortured into process of administration of his estate under the act. It did not appear when the order of special reference was made that he ever would be adjudged a bankrupt. The appointment of Receivers in bankruptcy can be justified only where it shall be found 'absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the Trustee is qualified.' Such a receivership certainly up to the time of an adjudication is purely a precautionary measure. Until after an adjudication the function of a receivership is not administrative of the estate in bankruptcy, but solely preservative. And this is equally true whether receivers in bankruptcy are or are not authorized by the Court to conduct the business of alleged bankrupts for limited periods. While such

authority can be conferred upon receivers only 'if necessary in the best interests of the estates,' the granting of such authority and action thereunder prior to an adjudication of bankruptcy can in no legitimate sense be deemed process of administration of the estate under the act.

"It doubtless is true that a Receiver may be authorized by the Court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt; but such action on the part of the Receiver before an adjudication does not constitute or involve 'process of administration under this act.' It is simply gaining control of the estate which is to be subjected to the process of administration if an adjudication of bankruptcy shall be made. If the appointment of a Receiver before adjudication *per se* constitutes process of administration and no adjudication be made the remarkable result is presented of a process of administration, and consequently a partial administration, in bankruptcy, of the estate of the alleged bankrupt where absolutely no beneficial object or purpose of the bankruptcy act can by any possibility be effected. The special reference before adjudication to inquire into 'matters pertaining to the business and conduct of the alleged bankrupt,' was premature, inquisitorial and not to be tolerated. Common fairness requires that the alleged bankrupt before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt. We are not aware of any provision in the Bankruptcy Act when fairly construed which justifies the order of special reference now before us."



In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ALBERT B. CAMERON, PETITIONER,
v.
THE UNITED STATES.

No. 931.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR UNITED STATES IN OPPOSITION.

This case is fully and fairly stated in the opinion of the Circuit Court of Appeals found on pages 133 to 136 of the record.

Proceedings in bankruptcy had been instituted against the Knickerbocker Piano Company, of which Cameron, the petitioner, was president and treasurer. After the institution of the proceedings and before the adjudication in bankruptcy, Cameron was examined under order of the court before a commissioner. On this examination it is charged that he swore falsely, and for such false swearing he was indicted. This is the first indictment in the case.

Later the Knickerbocker Piano Company was adjudged a bankrupt, and Cameron was again examined before a referee, under order of the

court. It was charged that he swore falsely on this examination, and he was indicted therefor. This is the second indictment in the case.

The two indictments were consolidated for the purpose of trial. Cameron was found guilty and was sentenced to one year's imprisonment in the New York County Penitentiary, Blackwell's Island, N. Y. He might have been sentenced to two years under either indictment, so that the sentence imposed finds adequate support upon either indictment.

As to the first, he complains that the examination was premature and not authorized by the bankruptcy statute, section 21-a, 544, 552, 30 Stat. As to this question, there is some difference of opinion in the District Courts and the Circuit Courts of Appeals, as pointed out by the petitioner. It is not necessary, however, to determine the matter here, as the conviction of the defendant must be sustained under the second indictment.

The complaint as to the second indictment i that the evidence of the petitioner given at the examination, in the course of which he committed the perjury for which he was indicted, was received against him upon the trial. That this was proper has been determined by this court in *Glickstein* v. *United States*, 222 U. S. 139. The petitioner complains now that more of this testimony was received in evidence against him than was necessary to identify what was charged to be

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false. As to this, the Circuit Court of Appeals says on page 135 of the record:

> The parts introduced were the alleged false statements and such other portions as were essential for this identification, and tended to show that the witness fully understood the nature of his testimony, and that it related to William C. Smith of St. Nicholas Avenue and to the property of the bankrupt piano company.

This, it is respectfully submitted, was right, and, in any event, presents nothing that calls for review by certiorari. The Circuit Court of Appeals concludes its opinion (R., 136):

> No one, we think, can read this record without being persuaded that the two essential facts have been proved beyond a reasonable doubt.
>
> FIRST, That the defendant, under oath, made the statements charged in the indictments.
>
> SECOND, That the statements were false.

It is respectfully submitted that the writ of certiorari should be denied.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1912.

○

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JAMES H. McKENNEY,
Clerk.

No. 165

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

ALBERT B. CAMERON, PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND PLACE ON THE SUMMARY DOCKET.

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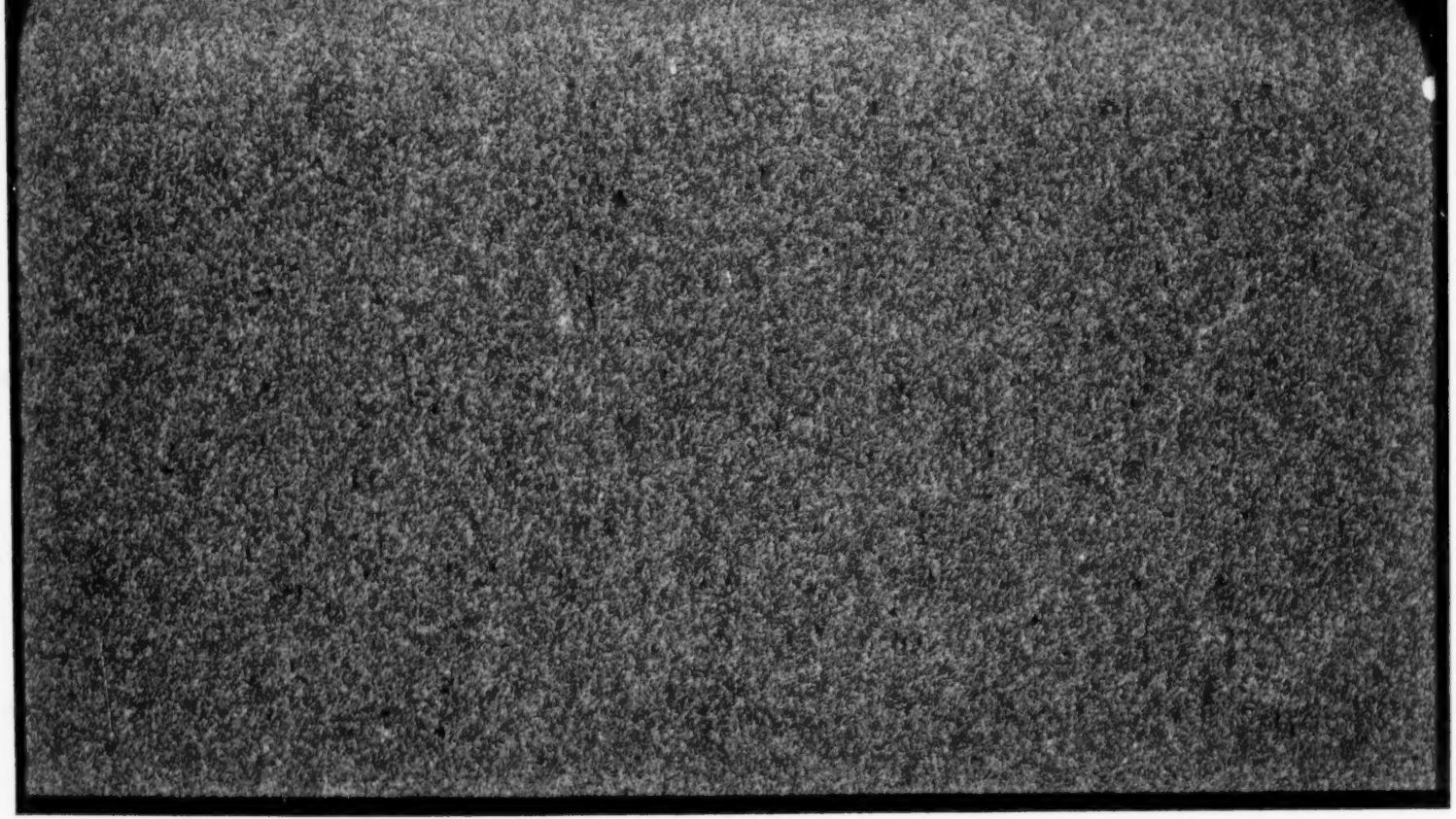

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

ALBERT B. CAMERON, PETITIONER,
v.
THE UNITED STATES. } No. 516.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND PLACE ON THE SUMMARY DOCKET.

The Attorney General, on behalf of the United States, moves the court to advance this case and place it on the summary docket for hearing at the next term.

The facts, briefly stated, are as follows: Proceedings in bankruptcy had been instituted against the Knickerbocker Piano Company, of which Cameron, the petitioner, was president and treasurer. Before adjudication he was examined under order of the court before a commissioner. On this examination it is charged that he swore falsely, and he was indicted therefor. Later the company was adjudged a bankrupt, and Cameron was again examined before a

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referee under order of the court. It was charged that he swore falsely on this examination, and he was again indicted. The two indictments were consolidated for purposes of trial. Cameron was found guilty and sentenced to one year's imprisonment in the New York County Penitentiary, Blackwell's Island, N. Y. The Circuit Court of Appeals affirmed the judgment of conviction. This court at the last term brought the case here by certiorari.

The case involves the construction of section 21–a of the bankruptcy act of July 1, 1898 (30 Stat. 544, 552), and section 860 of the Revised Statutes, the contention of petitioner being that under the former section the court was without authority to order an examination of witnesses by a special examiner prior to adjudication, and that under the latter section it was permissible for the Government in a prosecution for perjury to use only that portion of petitioner's testimony assigned as perjurious.

The public interests seem to require the prompt disposition of the case.

Opposing counsel concur.

JAMES C. MCREYNOLDS,
Attorney General.

WILLIAM R. HARR,
Assistant Attorney General.

APRIL 5, 1913.

○

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 516. 165

ALBERT B. CAMERON,
Petitioner,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

HOWARD S. GANS,
Counsel for the Petitioner,
233 BROADWAY,
New York City.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 516.

ALBERT B. CAMERON,
Petitioner,

vs.

THE UNITED STATES.

Brief for Petitioner.

Preliminary Statement.

This case comes before this Court upon a writ of *certiorari* to the United States Circuit Court for the Second Circuit, issued on the 30th day of January, 1912, to review a judgment of the Circuit Court of the United States for the Southern District of New York, entered on the 11th day of November, 1910, upon a conviction of the crime of perjury, and the judgment of the Circuit Court of Appeals for the Second Circuit affirming the judgment of the said Circuit Court, entered on the 21st day of December, 1911.

The trial from which the judgment of conviction resulted was based upon two indictments filed respectively August 3, 1910 (p. 6), and October 24, 1910 (p. 9) and consolidated for the purposes of trial on November 9, 1910 (p. 9). Each of these indictments charges the commission of perjury upon a hearing had in the course of bankruptcy proceedings initiated in July, 1909, against the Knickerbocker Piano Company, a

New York corporation, of which it is charged the defendant was the president and treasurer (p. 4).

By the first indictment it is charged that on the 13th day of August, 1910, upon an examination had pursuant to section 21*a* of the Bankruptcy Act prior to the adjudication in bankruptcy, the defendant swore falsely "in substance and effect to the following, to wit:

> "FIRST. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.
>
> "SECOND. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.
>
> "THIRD. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith eight pianos for the sum of Six hundred and sixty-eight Dollars" (p. 6).

By the second indictment it is charged that subsequently and after the adjudication in bankruptcy upon an examination held in the subsequent proceeding before the official referee he swore falsely "in substance and effect to the following, to wit:

> "FIRST. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith and had never known the said address.
>
> "SECOND: That he, the said Albert B. Cameron had had a conversation or conversations with the said William C. Smith, in regard to his, the said William C. Smith's buying pianos of and from the said alleged bankrupt" (p. 8).

Thus the offenses charged in the two indictments are differentiated in the following respects: (*a*) the *first* indictment is based upon testimony given upon the hearing before

the commissioner; while the second indictment is based on that given before the referee; (*b*) the perjury charged in the first indictment consisted of testimony to the effect (1) that the defendant shortly prior to the institution of the bankruptcy proceedings had had a conversation with one William C. Smith, the petitioning creditor in the bankruptcy proceeding, concerning the sale to Smith of certain pianos and (2) that as a result of that conversation he had sold to Smith eight pianos for the sum of Six hundred and sixty-eight Dollars, while the perjury charged in the second indictment consisted of testimony (1) to the effect that he had had a conversation with Smith in regard to the purchase of pianos by Smith and (2) to the effect that the defendant had never known Smith's address and had not been able to obtain it.

It was established without question that the testimony alleged to be perjurious was given; the issue litigated was as to the falsity of the testimony and its willfulness, if false.

The evidence *properly* received to establish the falsity of the three assignments of perjury of the first indictment and the second assignment of the second indictment (*i. e.* those charging as false, testimony to the effect that the defendant had had a conversation with William C. Smith which had resulted in the sale of pianos by him to Smith) consisted solely of denials by Smith that he had had such a conversation or that he had bought the pianos, and hence upon the basis of that which was *properly* admitted the evidence was left to stand with one oath balanced against the other and without that additional evidence to weigh against the truth of the testimony originally given by the accused which the law requires as a prerequisite to the submission of an issue of perjury to a jury.

The only other proof in support of this issue was that derived from the testimony of the defendant given upon the hearings in one or the other of the two proceedings above referred to, which was read in evidence against him on the trial in spite of his objection that under the provisions of Section 860 of the Revised Statutes of the United States he was guaranteed against its use for this purpose (see Point II*d*, p. 21).

In like manner the evidence *properly* received to establish the remaining assignment (*i. e.*, the first assignment of the

second indictment), which charged as false the defendant's testimony before the Referee to the effect that he did not know and had never known Smith's address, was, as will be pointed out hereafter (Point IV*b*, p. 38) insufficient to justify the submission of that issue to the jury. And in support of that issue the prosecution was permitted to read in evidence over the specific objection that its reception was violative of the immunity guaranteed to the defendant by section 860 of the Revised Statutes, not only testimony given by the defendant at the hearings before the Referee but testimony given by him in the entirely separate proceeding before the Commissioner, tending to create the inference that the matter assigned as perjurious was false and known to be false (see Point II*a*, p. 11). Beyond this, the prosecution was permitted to read in evidence, testimony given in one or the other of the two bankruptcy proceedings, which was not assigned as perjurious in either indictment, and to contradict the matter thus read by testimony read from the other proceeding or by the testimony of other witnesses (see Point II*b* and c, p. 16 and 17).

Indeed the trial was apparently conducted on the theory that the provisions of section 860 of the Revised Statutes did not limit the use of the testimony given in the Bankruptcy proceedings to proof of the fact that the defendant had sworn to the matters assigned as perjurious, and in the view that, notwithstanding the provisions of that section any testimony given by the defendant at those proceedings which tended to his prejudice, whether by creating an inference of falsity or disingenuousness in relation to the matters assigned as perjury or as tending to indicate that he had been untruthful in other and unrelated matters was receivable against him.

After the introduction of the record as to the initiation of the bankruptcy proceedings against the Knickerbocker Piano Company (p. 11, Exhibit 1, p. 42), the appointment of a receiver (p. 11, Exhibit 2, p. 44) and the making of an order pursuant to the provisions of section 21*a* of the Bankruptcy Act for the examination of the bankrupt, its officers and directors (p. 11, Exhibit 3, p. 49), the adjudication in bankruptcy and the transmission of the proceeding to one of the official referees (p. 13, Exhibit 4, p. 48), and after the introduction of the formal proof to establish that the defendant was

sworn and examined both before the Commissioner (pp. 11 and 12) and before the Referee (p. 13), and that his testimony in each instance was reduced to writing and subscribed by him *(ib)* the Government offered in evidence the *entire stenographic record* of the defendant's testimony taken before the Commissioner, embraced in two volumes (p. 13, Exhibits 5 and 5*a*).

To this offer the defendant's counsel objected, first, on the ground that the examination under section 21*a* of the Bankruptcy Act prior to adjudication was unauthorized (p. 11), and, secondly, upon the ground that the reception of the entire record of defendant's testimony given in such a proceeding was in violation of the protection which section 860 of the Revised States had guaranteed to a witness when the testimony was given (p. 13).

The prosecuting officer then proceeded, over repeated and specific objection from the defendant's counsel (p. 14, twice; p. 15, twice, p. 19), to read generally from the testimony, in order, as the learned prosecuting officer put it, that the jury might get "a comprehensive idea" of the defendant's testimony (p. 15).

In the same way and over like objection the Government was permitted to offer the entire record of the testimony given before the Referee comprising testimony given by other witnesses as well as the defendant (p. 14; Exhibit 6, p. 54), and in like manner and over similar objections based on the provisions of Revised Statutes, section 860 (pp. 18 and 19) to read generally from the defendant's testimony prejudicial matter of a similar character with the view, as stated by the learned trial Judge, *to throw light on the question of intent* (p. 19). And thus the provisions of section 860 of the Revised Statutes were completely ignored and its purposes completely nullified. This presents the most important question in the case.

Numerous other prejudicial rulings were made in the course of the trial. The prosecution was allowed to read in evidence testimony given by the defendant which was not assigned as perjurious; and then to offer evidence in contradiction thereof over the objection that such evidence was not within the issues (see Point IIc, p. 17). It was permitted to introduce evidence bearing upon the possession by the defendant of information as to Smith's address at a period subsequent to

the giving of the testimony assigned as perjurious, though the objection to the reception of the evidence was specifically pointed out (see Point VI, p. 44). It was allowed to introduce evidence of attempts made by other persons to obtain Smith's address and thus to inject into the case a false and prejudicial issue (see Point VI, p. 43).

These and other rulings together with the facts related to them will be considered in separate points.

The Errors Complained of are as Follows.

First. The admission in evidence of the stenographer's minutes of all the testimony (exhibits 5 and 5*a*) before the commissioner in the examination prior to adjudication (assignment of errors 5).

Second. The admission in evidence of Exhibit 6, the stenographer's minutes of all the evidence taken before the referee in bankruptcy (Assignment of errors 6).

Third. The reading in evidence of excerpts from Exhibits 5 and 5*a* other than the matter assigned as perjury in the first indictment (assignments 37 to 74, 118 to 137, excerpts printed pp. 11, 13, 19, 21 hereof.)

Fourth. The reading in evidence of excerpts from Exhibit 6 other than the matter assigned as perjury in the second indictment (assignment of errors 75 to 106; excerpts printed pp. 17 and 21 hereof)).

Fifth. The submission to the jury of the issues under the first indictment (assignment of errors, 24 25, 26, 111, 112, 113).

Sixth. The admission of evidence in support of that indictment (assignment of errors 1, 2, 3, 4, 5).

Seventh. The submission to the jury of the issues under the second indictment (assignment of errors 27, 114, 115).

Eighth. The reception of the testimony of the witnesses de Rochemont and Govers, with respect to a conversation between de Rochemont and the defendant in January, 1910 (assignment of errors 19, 21, 22, 23).

Ninth. The refusal to permit the defendant to cross-examine the witness W. C. Smith with regard to the testimony previously given by him (assignment of errors 13, 28).

TENTH. The admission in evidence of the testimony of the witness Leonard B. Smith as to his efforts to obtain the address of the said William C. Smith from sources other than the defendant (assignment of errors 107, 108, 109, 110).

I.

By the provisions of Section 860 of the Revised Statutes, the defendant was guaranteed against the reception in evidence against him of any part of the testimony given by him in either of the bankruptcy proceedings, save that which in the indictment based upon that proceeding was assigned as perjurious.

The defendant's testimony in the bankruptcy proceedings was given during the year 1909 (see Exhibits 5, 5*a* and 6). At that time section 860 of the Revised Statutes was in force,* and the testimony was given under the guarantee of immunity provided by that section in the following terms :

> " SEC. 860. [Pleadings, disclosures, etc., not to be used in criminal proceedings.] No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any Court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture : Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

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* The repeal was by Act of May 7, 1910.

It can hardly be questioned that this provision guarantees to a witness who gives testimony in any court, that though he may be prosecuted for perjury if he swear falsely, and though for the purpose of such a prosecution any testimony charged to be perjurious may be proved to have been given by him and, in that sense, "used" against him, his testimony can be used *for no other purpose*, and that testimony given in one proceeding may no more be used as an admission to establish that testimony given in that proceeding or testimony given in some other proceeding was false, or to throw light on the intent with which it was given than, it could be used as an admission against interest for the purpose of establishing any other crime. The only other interpretation conceivable—if it be conceivable—is that the proviso nullifies the preceding provisions of the statute, with respect to the crime of "perjury," and that the statute while forbidding the use of such testimony for *any* purpose, upon a prosecution for any other crime, permits its use *for all purposes*, upon a prosecution for perjury. But manifestly such a construction would run counter to the language and defeat the prime purpose of the statute.

It is a matter of legal history that when the statute was enacted it was deemed to afford a protection as broad as the constitutional guarantee against self incrimination, and that it sufficed to render incriminating testimony compellable (United States vs. M'Carthy, 18 Fed., 87, 89 and cases cited; *In re* Counselman, 44 Fed., 268; Peo. *ex rel.*, Hackley vs. Kelley, 24 N. Y., 74). Its purpose was undoubtedly to arm the civil courts with plenary power to elicit from witnesses whatever facts might be relevant to the cause on trial, and to obviate the miscarriages of justice which result when rights fail of enforcement through the insistence of witnesses that they may not be compelled to aid in the administration of justice at the expenses of revelations of their own criminality.

To accomplish that end it was obviously necessary that the immunity extend to every possibility of self incrimination; and it would surely have been obvious that a statute which, while forbidding the use of testimony for other incriminating purposes permitted its *general* use in prosecutions for perjury would have failed entirely of this primary purpose. For it has never been questioned that where there is any reasonable

possibility of incrimination, the witness's claim of privilege must be allowed (Counselman vs. Hitchcock, 142 U. S., 547, 565) and obviously it is always reasonably probable that a witness called in any proceeding may have been interrogated at a prior stage of that proceeding or in some other proceeding with respect to the matter as to which he is then being interrogated, and that a *truthful* answer to the question may show, that his *prior* testimony was erroneous and hence furnished an important link in the chain of proof available for his indictment and prosecution on the basis of his prior erroneous evidence.

Hence a statute which opened the door to the *general* use of the testimony given by a witness for the purpose of perjury prosecutions, would have left it open to every witness on every trial to refuse his testimony through a valid assertion of his claim against incrimination. Therefore it is inconceivable that the legislature intended to limit its prohibition against the use of testimony by permitting its *general* use in perjury prosecutions, or that it intended by the proviso to do more than to make it clear that perjurious testimony was not to be licensed through the process of rendering it impossible to prove that it had actually been given. The proviso was unnecessary, since in no event would the prohibition of the statute have been ultimately construed so as to prevent such use (Glickstein vs. United States, 222 U. S., 139). But such a construction was possible (*In re* Marx, 102 Fed., 676), and it was undoubtedly for the purpose of guarding against that possibility, and for that purpose only that the proviso was inserted.

Moreover the language of the proviso is singularly inappropriate to a general exception in favor of perjury prosecutions. It does not except perjury prosecutions from those in which it is forbidden to use the testimony. It provides, merely, that the prohibition against the use of testimony shall not "exempt"—*i. e.*, render the witness immune from—"prosecution or punishment for perjury"—as he would have been if his testimony were forbidden to be availed of even for the purpose of proving that it had been given.

If it had been intended to make a general exception as to perjury prosecutions and to provide that to such prosecutions the prohibition of the statute should have no application and

that in such prosecutions the door was to be wide open to receive any testimony wherever given, that purpose would have found a natural and simple expression, through the insertion of the words "except upon a prosecution for perjury" or words of similar import, so that the statute would have read:

> "No * * * evidence obtained from a * * * witness by means of a judicial proceeding * * * shall be given evidence * * * in any criminal proceeding *except upon a prosecution for perjury.*"

And if such had been the purpose it is inconceivable that the Congress would not have expressed it in some such manner.

Moreover, what may be said of this reasoning, it is clear that the proviso limits the prohibition only in so far as to prevent the exemption of the witness from prosecution for perjury committed "in testifying as aforesaid,"—*i. e.*, manifestly, in testifying in the particular proceeding in which the perjurious testimony is given; and that it leaves the sweeping prohibition against the use of the testimony in full force, so as to prevent its use to establish that on some other occasion the witness had testified falsely. And even in this limited view as to the scope of the prohibition the testimony admitted involved a flagrant violation of the defendant's rights (See Point II*a* and *b*, pp. 11 and 16).

All this seems so obvious as to make the foregoing discussion a work of supererrogation; but as the demonstration of error in the court below becomes complete so soon as there is accorded to section 860 its natural meaning, it has been thought wise to discuss and eliminate at the outset every conceivable interpretation which would justify the course adopted below.

II.

Testimony given in the bankruptcy proceeding other than that assigned as perjurious was read in evidence to the defendant's prejudice.

That the testimony in the bankruptcy proceeding which was used against the defendant was not confined to the matter assigned as perjurious is unquestioned. That the testimony thus received was prejudicial in the highest degree becomes apparent so soon as it is excerpted and arrayed in connection with the matter charged.

(*a*)

Testimony given before the Commissioner was used to prove the falsity of testimony given before the Referee.

The second indictment, based upon the testimony taken before the Referee, contained an assignment charging that the defendant had denied perjuriously that he had any knowledge of the address of W. C. Smith, and had asserted that he had never known that address (p. 8). The first indictment, based upon the testimony given before the Commissioner, contained no such assignment (p. 6).

Hence testimony relative to that subject given before the Commissioner was clearly inadmissible to establish the giving of any of the testimony assigned as perjurious, and hence was inadmissible for any purpose. Yet the prosecuting officer after being allowed to introduce in evidence the entire record of the testimony given before the Commissioner (p. 15) was permitted to read from it the following extract :

> " Q. Where is his [referring to W. C. Smith] place of business ?
>
> " A. He is not in business.
>
> " Q. Who is he ?
>
> " A. Why, an acquaintance of mine.
>
> " Q. *Where does he live ?*
>
> " A. *On St. Nicholas Avenue. I don't recall the address.*

"Q. *What number ?*
"A. *I don't remember.*
"Q. *Between what streets ?*
"A. *Above One Hundred and Twenty-fifth.*
"Q. *Is it an apartment or a private house ?*
"A. *Why, I think just a furnished room or rooms.*" *

Objection to the testimony was reasonably taken in the following form :

> "I object to this as immaterial and not within the issues. There is no allegation in the indictment, or the assignment of perjury, as to the alleged address of William C. Smith, and in the proceeding before the Commissioner * * *" (p. 15).

To this the prosecuting officer replied :

> "I am reading so the jury will get some sort of a comprehensive idea as to what the man testified to. This is the beginning of this alleged transaction with William C. Smith" (p. 15).

And upon this statement of the purpose of the testimony, the objection was overruled (p. 15), and the prosecution was permitted to read from the same source the following (p. 15) :

"Q. How long have you known him ?
"A. Oh, three or four years.
"Q. Do you know whether he is employed by any-anybody ?
"A. Yes, sir, but I don't know where.
"Q. You haven't any idea in what capacity he is employed ?
"A. No.
"Q. How often do you meet him ?
"A. Not very often.
"Q. How often did you meet him before this last transaction ?
"A. Oh, two or three times.
"Q. How long do you know him ?
"A. Three or four years, I think." **

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* Assignments of error 37 to 42.
** " " " 43 to 48.

At this point another objection was interposed on the same ground, but the prosecution was permitted to proceed with its quotation as follows (p. 15) :

"Q. Where did you first meet him ?
"A. New York.
"Q. Where ?
"A. I don't recall that.
"Q. Do you know anybody else other than yourself who knows Mr. Smith ?
"A. He has a number of friends.
"Q. Do you know of anybody ?
"A. My brothers.
"Q. Outside of your family ?
"A. No.
"Q. Is he related to you ?
"A. No.
"Q. Is he related to any member of your family?
"A. No.
"Q. *Do you know how he can be located ?*
"A. *Why, yes, I could get hold of him.*
"Q. *How could you get hold of him to-day ?*
"A. *I'd go and ask my brother.*
"Q. *You think he could give you the address ?*
"A. *Yes, sir, I think so.*" *

The prosecution thus was permitted to read in evidence testimony given before the Commissioner which had no relevance to any assignment of perjury alleged to have been committed in *that* proceeding, and which tended to establish that the defendant had sworn falsely in the *subsequent* proceeding, both when he testified that he *did not* know William C. Smith's address and that *he had not been able* to procure it.

If the defendant had been tried on the second indictment alone, it would have been too clear to admit of argument that the admission of the testimony given in this prior proceeding was in violation of the guaranty under which he had given that testimony and an invasion of his rights ; and it is submitted that the matter is rendered no less clear by the fact

* Assignments of error 49–58.

that he was also on trial under the first indictment for alleged perjury relating to an entirely different matter.

In the opinion of the Circuit Court of Appeals it is said that the claim of the petitioner, that testimony given in one proceeding was used to establish the falsity of testimony given in the other, was not borne out by the record; but it is submitted that in coming to this conclusion the learned Court must either have overlooked the testimony above referred to or have failed entirely to appreciate its relation to the charge contained in the other indictment.

A part of this evidence the learned Court justifies upon the theory that it was admissible in identifying the W. C. Smith subsequently referred to in the testimony charged to be perjurious as the W. C. Smith referred to in the indictment; and it is held that not merely the testimony charged to be perjurious was admissible, but all testimony offered for the purpose of establishing such identifying circumstances was likewise admissible.

To quote the language of the learned Court.

> "Where perjury is charged, the alleged perjurious testimony must from the nature of the case, be produced together with such other parts of the statement of the witness as are necessary to remove any doubt or ambiguity which might exist as to the time, the place and the individuals referred to by him.
>
> "It was therefore proper under the second indictment to read such portions as were necessary to identify the Smith referred to as the person who bought the pianos and whose address was alleged by the defendant to be unknown to him.
>
> "The parts introduced were the alleged false statements and such other portions as were essential for this identification and tended to show that the witness fully understood the nature of his testimony and that it related to William C. Smith of St. Nicholas avenue and to the property of the bankrupt piano company."

The soundness of this principle is challenged by the petitioner, and it is contended that ambiguities of this character

are, under the statute, to be removed by extrinsic evidence and not by the defendant's self-incriminatory admissions given under the guaranty that they should not be used against him.

But even if the principle were to be conceded, it would seem manifest that it could not justify the admission of this evidence. The William C. Smith referred to in the indictment is identified *therein* as the petitioner in bankruptcy against the Knickerbocker Piano Company (fol. 26), and there is no attempt therein to identify him by reference to his address or any other circumstance. If the rule laid down by the learned Circuit Court of Appeals were correct it would justify the introduction in evidence of testimony of the petitioner to the effect that the W. C. Smith referred to by him was the petitioner in bankruptcy proceeding; but it is impossible to discover in what way the petitioner's testimony that the W. C. Smith referred to 'was not in business,' that 'he was an acquaintance of the petitioner,' that 'he lived on St. Nicholas avenue at an unknown number above One Hundred and Twenty-fifth street in a furnished room,' and that 'the petitioner had known him three or four years' and 'did not know where he was employed, but that the petitioner's brother knew him and that the petitioner could obtain his address from his brother,' tended in any way to identify the W. C. Smith, to whom he was referring, with the W. C. Smith referred to in the indictment.

Moreover, it is clear that the testimony was not introduced for any such purpose. Had such a purpose been claimed all doubt might readily have been obviated by an admission on the part of the defendant that the W. C. Smith referred to in his testimony was the W. C. Smith who was the petitioning creditor in the bankruptcy proceeding; and, as no issue was raised upon that point throughout the trial, there is no reason to doubt that such an admission would have been forthcoming. But on the contrary, the purposes was declared to be "to give a comprehensive idea of what that man testified to" (p. 15).

Clearly, if the solemn guaranty of an immunity statute can thus be evaded, and if by such process of construction the immunity offered by the Government, as an inducement for a

witness to forego his constitutional privilege of silence, can be nullified, the promise contained in such a statute is of but slight value; and those who are called upon to testify under circumstances where such statutes apply will be ill-advised unless they disregard the statute and rely solely upon the complete protection with which the constitution hedges them about.

The foregoing is but a small part of the testimony thus admitted in violation of the guaranties of the statute. It has been emphasized because it presents the clear cut case of testimony given in *one* proceeding tending to establish a material fact necessary to the conviction of the witness for perjury committed in *another* proceeding. But the same violation of the petitioner's rights is manifest throughout the reading of the testimony given by him in the two proceedings. No care was manifested by the prosecution nor enforced by the Trial Court to limit the reading of that testimony within its proper bounds; that is, to establish the fact that the matter assigned as perjurious had actually been testified to; and no effort on the part of the defendant's counsel served to keep it within those bounds. This is manifest throughout; but further striking examples of it may well be cited.

(b)

The prosecution was permitted to read testimony given before the Referee which contradicted testimony given before the Commissioner on a matter not assigned as perjurious in either indictment.

Neither indictment charged any false testimony as to the defendant's knowledge of Smith's friends, yet under the same ruling of the Court the prosecuting officer was permitted to read the following questions from the testimony taken before the Commissioner (p. 15):

> "Q. *Do you know anybody else other than yourself that knows Smith?*
>
> "A. He has a number of friends.
>
> "Q. Do you know any of them?
>
> "A. My brothers (pp. 15 and 16)." *

* Assignments of error 51 and 52.

And to thus place it in opposition to the following testimony given before the Referee:

"Q. Did you know anyone that knows him?

"A. I am not acquainted with his friends.

"Q. That is not what I asked. Do you know *anyone* that knows him?

"A. *No*" (p. 19).*

And thus by contrasting the answers given in the two proceedings to establish that in a matter not assigned as perjurious the defendant had sworn falsely on one or the other of the two occasions.

(c)

Testimony not assigned as perjurious was read as a basis for contradiction by the witness Smith, and thus the jury was permitted to consider further evidence that the defendant had sworn falsely in matters not assigned as perjury in either indictment.

The perjury assigned with respect to the conversations and the purchase of the pianos, was limited to allegations that the defendant "had a conversation with the said William C. Smith concerning the sale of pianos" (First indictment second assignment). That he "had had a conversation or conversations with the said William C. Smith in regard to his (Smith's) buying of pianos" (second indictment second assignment) and "that he had sold a number of pianos to" said Smith, to wit: "eight pianos for the sum of Six hundred and sixty-eight Dollars" (first indictment, first and third assignments).

There is no assignment in either indictment purporting to set forth the details of the conversation or any acts connected therewith.

The assignments were plainly referrable to certain specific testimony and the factum of testifying was readily provable thereby.

The following testimony given before the Commissioner sufficed to establish that the defendant had sworn as charged in the first indictment.

"Q. Did you shortly prior to the filing of the petition sell some pianos and realize cash on them?

* Assignments of error 84 and 85.

" A. Yes, I did.
" Q. To whom were they sold ?
" A. To W. C. Smith " (p. 15).
" Q. Did he come down to the factory ?
" A. Yes.
" Q. What did you say to him ?
" A. I explained the circumstances (p. 16).
" A. We ended up by me selling him eight pianos.
" Q. For how much ?
" A. Approximately $700.
" Q. Approximately how much did you get from Smith ?
" A. Well, when we got through figuring it was $668 ; something like that " (p. 17).

While the following testimony before the Referee sufficed to establish that he had sworn as charged in the second indictment :

" Q. How many conversations did you have with him in regard to buying the pianos ?
" A. One conversation.
" Q. How many conversations did you have with him in regard to buying the pianos--was that the only conversation or did you have others ?
" A. One conversation.
" Q. It was all arranged in one conversation, was it ?
" A. One conversation " (p. 18).

Manifestly this sufficied to establish that the defendant had testified as alleged in the indictments and manifestly this and only this was admissible. Yet the prosecuting officer was permitted to read in evidence so much of the examination in the bankruptcy proceeding as searched for details of the conduct of the negotiations and then to contradict the testimony thus given as to these details.

Thus he was permitted to read in evidence the defendant's testimony given before the Commissioner to the following effect :

"Q. Tell us what you said.

"A. I told him I had to raise a certain amount of money by Monday morning and that I would sell him such and such pianos for such and such amount of money.

"Q. What did he say?

"A. He accepted it.

"Q. There wasn't any bargaining between you and your friend Smith, was there?

"A. Well, there was bargaining and dickering (p. 16).

* * * * * * *

"Q. Tell me what Smith said to you when you told him.

"A. Well, he demurred at the price; at first hesitating about advancing the amount of money. We got together.

"Q. What was the first price you asked Smith?

"A. I wanted to get about $1,000.

"Q. How many pianos did you want to give him?

"A. I hadn't set that in my mind (p. 16).

"Q. You don't mean to say you told Smith you did not have the number of pianos set in your mind for which you wanted $1,000?

"A. No, I mean I wanted to raise $1,000, and I was going to sell enough pianos to do it. But I did not; I sold about $700 worth, which was the amount I needed for Monday morning" (p. 17). *

And after having thus been permitted to read in evidence testimony which was both extraneous to the issues and prohibited by the provisions of section 860, the learned prosecuting officer was permitted to contradict the matter thus read by the testimony *of Smith*, as follows:

"Q. Did you ever during the year 1909 call at the office of the Knickerbocker Piano Co. and there have a conversation with A. B. Cameron, at which he told you that he had to raise a certain amount of money by Monday morning?

"A. I never had.

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* Assignments of error 120 to 126.

"Q. Mr. Smith did you at any visit that you ever made to the Knickerbocker Piano Co. in the year 1909, have a conversation with Mr. Albert B. Cameron, wherein you dickered back and forth as to the price of eight pianos?

"A. No, sir, I did not.

"Q. Mr. Smith, did you ever say to Mr. Albert B. Cameron that you demurred to the price at first, hesitating about advancing him money?

"A. No, sir" (pp. 21 and 22).

It is to be observed that these questions addressed to Smith were objected to on the proper ground that they were not within the issues (pp. 21 and 22), and also that prior to the asking of these questions the prosecution had been permitted to adduce all of Smith's denials that could properly be received within the issues, as follows:

"Q. Now, Mr. Smith, did you ever have any dealings with Mr. Albert B. Cameron in regard to the purchase or sale of pianos in the year 1909?

"A. I do not remember of having any.

"Q. Do you know whether you did or not?

"A. No, I did not.

"Q. Now, Mr. Smith, did you at any time or at any place purchase any pianos from Albert B. Cameron?

"A. No, I did not" (p. 21).

(d)

The prosecution was permitted to read testimony not assigned as perjurious on the theory that it tended to establish his criminal intent.

As has been pointed out above the charges of perjury in the second indictment were confined to the question of the sale of the pianos, the conversation leading up to the sale and the petitioner's knowledge of Smith's address and his inability to obtain it (pp. 6 and 8). There was no assignment of perjury with respect to the delivery of the pianos or to any acts leading up to it. Yet over the objection of the defendant's counsel, and with the specific statement from the Court to the effect that "*any-*

thing that tends to throw light on the intent is admissible " (p. 19), the prosecuting officer was permitted to read the following :

" Q. Now, did you ever do any business with Smith before ?

" A. I never sold him any pianos before.

" Q. Did you ever have any business with him before ; do any ?

" A. No, not business.

" Q. He is not in the piano business ?

" A. No. (p. 16).

" Q. Did Smith take the pianos away ?

" A. They were delivered to his order ; I don't know (p. 19).

" Q. Who delivered them ?

" A. I don't know—our carman, I think (p. 19).

" Q. Who gave the orders to the carman ?

" A. I don't know whether he got a written order or I mentioned it to him.

" Q. Didn't he have the transaction with Smith ?

" A. Yes.

" Q. Was there anybody else but you ?

" A. Yes, sir.

" Q. Didn't you give the order to the car man ?

" A. I don't know whether I mentioned these goods would be going out at such time.

" Q. Somebody must have given the order to the car man to take them out of the place ; who was it ?

" A. I mentioned those goods would be ready at such a time and they were afterwards moved away from the factory.

" Q. Where did they go ?

" A. I don't know.

" Q. Who is the car man ?

" A. Hugh Kiernan.

" Q. You didn't tell him where to take those pianos ?

" A. I may have intimated where I thought it would be.

" Q. Where did you think ?

"A. I thought they might be going temporarily into storage, for instance.

"Q. Where, for instance, did you think temporarily they would go?

"A. There was a number of storage warehouses.

"Q. Didn't you know as a matter of fact where those pianos went to and where they are to-day?

"A. No, I don't know.

"Q. Give us your hearsay knowledge as to where they went?

"A. I think they would be at a storage warehouse up there near the Harlem River.

"Q. Give us the name?

"A. The Harlem Terminal, I think.

"Q. Have they been removed by Mr. Smith since the filing of the petition?

"A. I don't know.

"Q. Have you heard?

"A. No.

"Q. Did you enter upon your book the sales to Smith?

"A. No, I didn't have time to do that.

"Q. What did you do with the money you got from Smith?

"A. The money I got for those pianos went partly for payroll that week and the balance for counsel fees.

"Q. Have you a piano register?

"A. Yes, sir.

"Q. Where is it?

"A. I don't know unless it is here.

"Q. Would you know it if you saw it?

"A. (Looking) I don't see it here." *

Manifestly nothing could be more clearly prejudicial, or could tend more potently to create an impression of falsity and wilfulness in the alleged perjurious testimony as to the sale and as to the conversations leading up to it, and hence we submit nothing could be more clearly inadmissible under the guaranty of the statute. For manifestly the statute must be read in the light of its history as an attempt to

* Assignments of error 86 to 106.

supply a protection which would be coextensive with that guaranteed by the constitutional prohibition of compulsory self-incrimination. And since the earliest authoritative interpretation of that constitutional provision establishes that it protected the witness not only from revealing the facts constituting the criminal act but from revealing any fact, however slight, which tended to furnish a link in the chain of his conviction (1 Burr's Trial, 243; Ballman vs. Fagan, 200 U. S., 186, 195); it is clear that a statute which was designed to afford a like immunity by compelling testimony and thereafter prohibiting its use, must be construed as prohibiting the use of testimony tending to establish the intent as well as the use of that which tends to establish the material elements of the crime.

The question here involved is one of good faith on the part of the Government. In effect the Government has said to the petitioner: If you will testify in the courts and thus refrain from blocking the administration of the law, as you might by insistance upon your constitutional rights, we, the United States of America, will guarantee that your testimony will not be used for your incrimination, save that if it is charged that you have testified falsely you must be prepared to have testimony, which is charged to be false, read in evidence as a basis for the determination of its truth or falsity. This guaranty the petitioner has accepted, as other witnesses are daily accepting similar guaranties under the Bankruptcy Act and other statutes; and, having accepted that guaranty and having waived his constitutional rights to silence, in reliance upon it, he now finds that by a process of judicial construction, the guaranty is held to mean something other than is conveyed by its plain terms, and that not merely is the testimony wherein he is charged to have sworn falsely permitted to be read against him, but the whole body of his testimony whether given in the same or in another proceeding is allowed to be introduced to establish that what was charged to be false is false and that the falsehood was wilful.

With all respect, therefore, to the learned Circuit Court of Appeals, we submit that the ruling was error, and that a conviction based upon such a ruling ought not to be permitted to stand.

POINT III.

The right to immunity from the use of this testimony was not affected by the subsequent repeal of Section 860 of the Revised Statutes.

As has been pointed out above, the testimony was given during the period from August to November, 1909, while Section 860 of the revised statutes, which was not repealed until the following May, was still in force.

The trial was not had, however, until November, 1910, *i. e.*, after the repealing act had taken effect; and, since the repealing act contains no specific saving clause *, it is conceived possible that the government may urge here, though that contention was specifically repudiated by the government in the court below, that by the repeal the defendant's rights have been swept away, that the guarantees under which the testimony was given may be disregarded, and that the defendant may be convicted upon the basis of testimony which he had a perfect right to withhold and which he gave in reliance upon the solemn promise of the government that it would not thereafter be used against him in a criminal case.

That such a contention shall be permitted to prevail, and that an intention to perpetrate so flagrant a breach of faith should be imputed to the national legislature, would seem to us impossible. Even if precedents were lacking, the immorality and injustice of such a result, would induce the courts to resort to every permissible process of construction to prevent a result so abhorrent to every instinct of justice and so foreign to the genius of our jurisprudence.

But there is no lack of precedent or of legal reasoning for its condemnation. Indeed, the precise question has been de-

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* The repealing act reads as follows:

> "*Be it enacted:* That section eight hundred and sixty of the revised statutes of the United States be and the same is hereby repealed."

termined by the Courts of New York upon reasoning which we believe must commend itself to this Court.

Lapham vs. Marshall, 51 Hun, 36, 41.

In that case the facts were as follows: The defendant had been examined in supplementary proceedings under a statute which provided that testimony so given should not thereafter be used as evidence against the person so answering in any subsequent action or proceeding whether civil or criminal. Subsequent to the giving of the testimony this statute was amended so as to limit the prohibition of the use of testimony to *criminal* proceedings; and thereafter in a *civil* action the testimony was introduced against the defendant. This the Court held to be error, saying (page 41):

> "It is undoubtedly true that the legislature may change or alter the mere rule of evidence and establish a new way or manner of proving or disproving a question of fact in controversy; but we think the question under consideration involves something more than a rule of evidence, and the immunity which the statute bestowed upon witnesses examined before the repeal took place continued after the repeal, and may be invoked in their behalf when their evidence is sought to be read in a civil action. But for the immunity offered by the statute, that the evidence should not be used against a witness in a criminal proceeding, she could not have been compelled to answer questions propounded to her, relative to the consideration which she paid for the deed, nor the circumstances attending its execution and delivery. It is true that the indemnity offered by the statute, as it read before the amendment, was broader than it was necessary that the legislature should provide for the purpose of compelling an answer to the inquiry made of the witness, nevertheless, it was one of the considerations which the legislature then thought proper to offer for the purpose of inducing the witness to disclose secrets relative to her private transactions. No one will contend that if the legislature had withdrawn all the indemnity given by the statute, including the one that the evidence should not be read on a criminal trial, charging the witness

with the same fraud as that to which the evidence related, that the same could be read against the witness upon an indictment, charging that the deed was executed with an intent to cheat and defraud the creditors of the grantor. The provision of the statute which was repealed was as sacred as the one which remained in effect, and it would be unjust to the witness not to give her the full benefit of the promise made by the legislature, when she gave her evidence, and we think that no such effect should be given to the amendment. In determining the effect of the amendment we must assume that the legislature did not mean to violate its promise given to the witness, nor to divest her of an acquired right. It is always to be presumed that a statutory law, as to its legitimate office, was intended to furnish a rule as to future actions, to be applied in cases arising subsequent to its enactment. The law is never to have retroactive effect, unless its express letter or clearly manifest intention requires that it should have such effect."

And while we have discovered no federal authority directly upon all fours, the principles of construction and of substantive law established by the federal courts leave no other conclusion possible.

The only basis for a construction which would permit any other result is the purely formal reasoning that, since, when the evidence was offered no statute forbade its reception, it was permissible to receive it irrespective of the conditions under which it had been obtained.

A moment's reflection upon general legal principles will suffice, however, to demonstrate the vice in reasoning of this character. For it is clear that even in the absence of statutory prohibitions the law forbids the reception of admissions secured by deceptive or coercive methods.

Thus it has been held that if a police officer or magistrate through a deceptive offer of immunity, secures an admission from a prisoner, the courts—though *no statute* prohibits the use of the admission so secured—will not permit it to be used.

Sorenson vs. United States, 143 Fed. Rep., 820 (C. C. A. 8th Circuit).

Bram vs. United States, 168 U. S., 532, 550.

And certainly the same policy of the law which holds that a prisoner is justified in relying upon the word of a police officer and which will not permit him to be prejudiced by such reliance, will justify him in relying upon the solemn guarantee of the national legislature, and will not permit that guarantee to be violated to his prejudice.

Assuredly this is true unless the terms of the legislative enactment are so unmistakably clear as to leave no conclusion possible save that the Congress intended that deceit of this character should be practiced in the name of the government. And since it is impossible to contend that the repealing act discloses an affirmative intent that the general rule of evidence should be changed and that the national guaranty should be violated the mere fact that the evidence had been secured by the promise of immunity would suffice to compel its exclusion.

But beyond this, every recognized canon of statutory construction requires that the intent to sanction a breach of faith should not be imputed to Congress, that the repeal should be given a prospective effect, that it should not be so interpreted as to destroy a substantial right previously perfected, and that an exception be read into the repealing act, if necessary, in order to avoid the immoral and unjust—if not unconstitutional—results which would otherwise flow from it.

> "Courts, however, always avoid a construction
> "which will render a statute subversive of sound
> "morality, unjust, or absurd, if a more sensible con-
> "struction can be given to it; and, if its terms be such
> "that it must unavoidably lead to evil, unjust or absurd
> "consequences, the courts give to it such effect only as
> "is necessarily required by the clear import of its an-
> "guage. This is not rejecting or revising the action of
> "the Legislature, but effectuating what is reasonably
> "and conclusively presumed to be its real intent."
>
> *Whitfield vs. Ætna Life Ins. Co.* (C. C. A., Eighth Circuit, VAN DEVANTER, J., writing), 144 Fed., 356, 360.

"General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be pre-

sumed that the legislature intended exceptions to its language which would avoid results of this character."

United States vs. Kirby, 7 Wallace, 482-486.
Chew Heong vs. United States, 112 U. S., 536-554.
Heydenfeldt vs. Daney Gold and Silver M. Co., 93 U. S., 634-638.

And above all a construction which would involve for the government the disgrace of a breach of good faith, will by every possible means be resisted.

United States vs. Taylor, 104 U. S., 216, 221.
Town of Red Rock vs. Henry, 106 U. S., 596, 604.
United States vs. Central Pac. R. R. Co., 118 U. S., 235, 240.
United States vs. Hosmer, 9 Wall., 432, 435.

Furthermore, a statute will not be given a retrospective operation, unless by its plain terms that result is rendered imperative.

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the Court will presume that the law making power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past."

White vs. United States, 191 U. S., 542, 552.
United States vs. Heath, 3 Cranch, 399, 408.
Twenty per cent. Cases, 20 Wallace, 179, 187.
Reynolds vs. McArthur, 2 Peters, 434.

And that it will never be given such an effect so as to destroy vested rights.

United States vs. Chew Heong, 112 U. S., 536, 559.
Twenty per cent. Cases, 20 Wallace, 179-187.

And, finally, it is settled that even where the terms of the statute are so clear and unambiguous as to leave no room for doubt or question, yet if the statute is so comprehensive as to include within its letter that which it would be absurd or unjust to include within its spirit, an exception may be read

into the statute to conform the letter to the spirit and to prevent an application such as it is plain the legislature could not have contemplated, and which it is clear they would have repudiated had the subject been presented to them.

> " Exceptions may be presumed or words omitted or
> " supplied when it is necessary to accomplish the ob-
> " vious intent of the lawmaker and to prevent injustice
> " or oppression."
>
> *Davis vs. Bohle*, 92 Fed., 325, 328 (C. C. A., 8th Circuit).

> " All general terms in statutes should be limited in
> " their application so as not to lead to injustice or op-
> " pression or any unconstitutional operation if that be
> " possible. It will be presumed that exceptions were
> " intended which would avoid results of that nature."
>
> *Carlisle vs. United States*, 16 Wall., 147, 153.
> *Rector of Trinity Church vs. United States*, 143 U. S., 457, 460, 461.
> *United States vs. Kirby*, 7 Wall., 482.
> *Kennedy vs. Gibson*, 8 Wall., 498, 506, 507.
> *Taylor vs. United States*, 207 U. S., 120, 125.
> *Hawaii vs. Mankichi*, 190 U. S., 197, 212, 213.

An application of these principles makes it clear that the repeal of section 860 of the revised statutes, may not be construed so as to operate upon testimony given prior to the repeal, and thus to deprive the witness of the immunity which he had secured when he gave the testimony, and that to avoid these results there will be read into the statute, if necessary, a saving clause or exception in favor of those witnesses whose testimony was given prior to the repeal.

Indeed, the situation is particularly appropriate for the application of these principles. The immunity guaranteed by the statute has been regarded uniformly as a partial substitute for the constitutional protection against self-incrimination. To be sure, it did not suffice to render incriminatory testimony compulsory, but it represented a policy of the law which deemed it conducive to the efficient administration of justice, that witnesses should be induced to waive their constitutional rights and be persuaded to make disclosuress of their acts in return

for the qualified immunity of freedom from the use of the disclosures which they might make. The right thus acquired is a vested right, and, since the repealing act does not in unmistakable terms provide that it shall be divested it will be deemed to be unaffected by the repeal.

Society, etc. vs. New Haven, 8 Wheat., 461, at p. 494.
Twenty Per Cent. Cases, 21 Wall., 179, 187.

Thus it has been held that immunity from punishment for a crime resulting from the running of a statute of limitations, is a vested right, and that a statute which extended the period of limitations, as applied to a crime which under the existing statute was barred, was an invasion of such a right and, therefore, unconstitutional.

Moore vs. State, 43 N. J. Law, 203, 227, 256.
Com. vs. Duffy, 96 Pa. St., 506, at 514.
State vs. Sneed, 25 Texas Rep. (Supplement), 66.

The same principle has been applied to an act of amnesty, it has been decided that rights acquired under such an act may not be divested by the repeal of the act.

State vs. Keith, 63 N. C., 140, 144.

And, manifestly, there can be in principle and logic no distinction in this regard between the character of the rights secured through the complete immunity of an act of amnesty or an immunity statute and that acquired through a qualified immunity statute such as that here under consideration. The extent of the immunity differs, but the nature of the right is the same; and if a *complete immunity acquired* through compliance with the terms prescribed by the legislature, by lapse of time, or by act of the party, constitutes a vested right, the *qualified* immunity resulting from a similar compliance can have no other character.

Hence, in the absence of provisions to make it unmistakably clear that it was intended to have a retrospective operation, it must be held that the repeal of the statute left the right unaffected.

Beyond this, however, it is clear that the Congress could not have intended the repeal to operate to defeat rights acquired

upon the faith of the statute, since such an intention would imply lack of morality and an intent to contrive injustice which will not be imputed, and it needs no argument to convince that, had the question been suggested, those who voted for the repeal would have been unanimous in their desire to exempt from its operation the rights which had been acquired in reliance upon the act. And it is settled that under such conditions the Courts may and will read into the act the exception or qualification necessary to bring its letter into accord with the spirit which animated its enactment.

Among the more striking illustrations of the doctrine is the case of the *Rector of Trinity Church vs. United States*, 143 U. S., 457.

In that case the subject of construction was the contract labor law, which provided as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, that from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

The question to be determined was the applicability of the statute to the case of a clergyman who had accepted a call from Trinity Church under a contract regulating his services and remuneration.

It was unquestioned that the statute, by its terms, embraced the case, and it was the more difficult to read into it an exception in favor of a contract with clergymen, by reason of the fact that the statute itself excepted certain professions,

and did not include the clergy among its exceptions. Yet this Court held that by reason of the absurdity resulting from its application to the clergy and the certainty that the legislature of a religious community committed to the principles of religious freedom, would have excepted the clergy from the operation of the statute if the possibility of its application to the clergy had occurred to it, the exception would be implied.

This Court said:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service and employs labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from such broad meaning to the words, makes it unreason-

" able to believe that the legislator intended to include
" the particular act."

Rector, etc., of the Holy Trinity Church vs. United States, 143 U. S., 457, 460, 461.

In like manner it was held in *Hawaii vs. Mankichi*, 190 U. S., 197, 215, that though the plain reading of Newlands resolution under which the Island was annexed continued only such previous legislation as was " not contrary to the provisions of the constitution of the United States," yet the resolution must be so interpreted as to continue in effect forms of criminal procedure forbidden by the constitution, since otherwise the Islands would have been left without any enforceable criminal law.

This Court said:

" But where the application of a procedure, hitherto
" well known and acquiesced in, left nothing to take its
" place, without new legislation, the result might be so
" disastrous that we might well say that it could not
" have been within the contemplation of Congress. In
" all probability the contingency which has actually
" arisen occurred to no one at the time. If it had, and
" its consequences were foreseen, it is incredible that
" Congress would not have provided against it."

Hawaii vs. Mankichi, 190 U. S., 197, 215.

This doctrine has been followed in numerous instances both by this Court and by the minor Federal tribunals. It has been applied, not only to the construction of original enactments, but to the interpretation of amendatory acts (*Kennedy vs. Gibson*, 8 Wallace, 498, where the omission of the word " by " from an amendatory statute, which resulted in depriving National Banks of the right to sue in the Federal Courts, was held to be " unintentional " and the word was read in), and is to be taken as the settled law of the land.

And, assuredly, there could be no stronger occasion for its application than a case such as is here presented, where the statute read without such an exception would involve gross injustice to the individual and shame to the government.

Moreover, a saving clause may be found in the Revised Statutes themselves.

Section 13 of the Revised Statutes provides as a rule of future construction (*Reisinger vs. United States*, 128 U. S., 398), that

> "The repeal of any statute shall not have the effect
> " to release or extinguish any penalty, forfeiture, or lia-
> " bility incurred under such statute, unless the repeal-
> " ing act shall so expressly provide, and such statute
> " shall be treated as still remaining in force for the
> " purpose of sustaining any proper action or prosecu-
> " tion for the enforcement of such penalty, forfeiture
> " or liability."

The section is unlimited in its application, and there is nothing within its terms which would exempt from its operations the liabilities of the government, or its officials. The word "liability" is commonly used generically to include all forms of "obligation."

It is "the state of being bound or obliged *in law or justice* to *do*, pay, or make good something; legal responsibility," *Black's Law Dictionary;* "Responsibility, the state of one who is bound *in law and justice* to *do* something which may be enforced by action," *Bouvier's Law Dictionary;* "The state of being bound or obliged in law or justice, responsibility," *Webster's Dictionary;* and see

Wood vs. Curry, 57 Col., 208, 209.
Benge's Administrators vs. Bowling, 106 Ky., 575.
Piller vs. Southern Pacific R. R. Co., 52 Col., 42, 44.

Under the provisions of Section 860, there was imposed upon the government and its officials an obligation to confer a qualified immunity upon the witness who brought himself within its terms; and, hence, under the provisions of Section 13, the obligation so incurred was left unaffected by the repeal.

Furthermore, the act read without an exception would be void as an *ex post facto law*.

An *ex post facto law* has been defined to be one which "in relation to the offense or its consequences, alters the situation of a party to his disadvantage," (*United States vs. Hall*, 2

Wash., 366; *Kring vs. Missouri*, 107 U. S., 221, 229); and among the universally recognized categories of *ex post facto* laws are those that "alter the legal rules of evidence and receive *less or different testimony* than the law required at the time of the commission of the offense," (*Calder vs. Bull*, 3 Dall., 386; *Kring vs. Missouri*, 107 U. S., 221, at 228).

It is true that these definitions must be taken with some reservations, since laws which affect *mere matter of procedure*, without touching anything in the nature of substantial rights, may be sustained, though the result may be to render a conviction less difficult. Thus in *Hopt vs. Utah*, 110 U. S., 574, it was held that a statute which removed the disqualification of convicts, and thus enabled a witness to testify, who at the time of the commission of the offense was disqualified, was not *ex post facto*. But there the disqualification was one in which the defendant had no interest, and which he had no right to insist should be maintained. It was subject to removal at the time of the commission of the offense—either by reversal of the conviction by the Court or by pardon from the Executive—and hence its removal by the legislature imposed upon the prisoner no disadvantage that was not within the bounds of reasonable probability when the crime was committed.

On the other hand, it is settled that the change of a rule of procedure whereby "any substantial right" is affected is *ex post facto*.

Thompson vs. Utah, 170 U. S., 343, 351.

See, also,

Hart vs. State, 40 Ala., 37, and *State vs. Johnson*, 12 Minn., 476.

And the same authorities that have held laws extending the period of limitation so as to embrace crime already barred when the extension took place, and which have held the repeal of an amnesty act to be an interference with vested rights, have also held that such laws are *ex post facto*.

Moore vs. State, 43 New Jersey Law, 203, 256.
Commonwealth vs. Duffy, 96 Pa. State, 506, 514.
State vs. Sneed, 25 Tex. Rep. (Supplement), 66.
State vs. Keith, 63 N. C., 140, 144.
A. & E. Enc. of Law, *Vol. 12*, p. 528.

The same principle has been applied in the Federal Courts to an act compelling a defendant in a penalty action to produce evidence against himself.

United States vs. Hughes, 8. Ben., 29.

And a recognition of this principle is implicit in the reasoning of the Court in *Brown vs. Walker*, 161 U. S., 591, whereby the provisions of the Interstate Commerce Act which rendered the giving of testimony thereunder compulsory were held to be constitutional. For the constitutionality of that provision was sustained only on the ground that the immunity which the statute guaranteed in return for the testimony, afforded a protection against self-incrimination, co-extensive with that accorded by the constitution. And manifestly, if a repeal of those immunity provisions would not have been *ex post facto* and thus void as to those who testified in reliance upon the provisions and the immunity thus acquired had been subject to revocation at the will of the Legislature, it would have offered an extremely insecure guarantee against the prejudice against which the constitutional provision furnished an absolute safeguard.

And the difference between such a statute and the one under consideration is merely one of degree and not of kind.

Finally, the defendant acquired under the bankruptcy Act the same rights as were accorded him by Section 860. Sections 7, a-9, of the bankruptcy act provides:

> " When present at the first meeting of his creditors,
> " and at such other times as the Court shall order,
> " submit to an examination concerning the conducting
> " of his business, the cause of his bankruptcy, his deal-
> " ings with his creditors and other persons, the amount,
> " kind, and whereabouts of his property, and, in addi-
> " tion, all matters which may affect the administration
> " and settlement of his estate ; *but no testimony given by*
> " *him shall be offered in evidence against him in any*
> " *criminal proceeding.*"

The defendant was examined as one of the officers of the bankrupt company, and *pro hac vice* was the bankrupt, and entitled to the immunities guaranteed by the section.

In re. Alpine & Lake Cotton Co., 131 Fed., 824, 826;

In re. Royce Dry Goods Co., 133 Fed., 100, 106.

IV.

The evidence was insufficient to justify the submission of any of the assignments of perjury, and it was error to deny the defendant's motion to take the case from the jury and for the direction of an acquittal.

(a)

There was no evidence sufficient to support a finding of perjury based upon the defendant's testimony as to the sale of the pianos, and the conversation with respect thereto, and it was error to submit that issue to the jury.

As has been pointed out, the only evidence offered to establish that the defendant did not have the conversation and did not make the sale to which he testified before the Commissioner and Referee, is the denial of William C. Smith, the person with whom the conversations were said to have been had and to whom the sale was said to have been made.

The case presented, therefore, a bare conflict of evidence between two witnesses—and stood with one oath to weigh against the order and with nothing to bear the scales against the truth of the defendant's testimony.

And it is well settled that a conviction of perjury will not be permitted, unless there is something beyond the testimony of a single witness to be weighed against the testimony claimed to be perjured.

United States vs. Wood, 14 Pet., 430, 438.

Sulivan vs. United States, 161 Fed., 253, 255 (Circuit Court of Appeals, 1st Circuit).

(*b*)

There was no sufficient evidence to support a finding of perjury, based upon the defendant's ignorance of Smith's address, and it was error to submit this issue to the jury.

The defendant is accused of false swearing in testifying that "he had not been able to obtain the address of said William C. Smith and had never known the address" (fol. 43).

To establish that the testimony was false, it was necessary to prove, (1) that the defendant had information of *an* address which he had reason to believe was Smith's, and (2) that his information was *correct*, and that the address of which he had information was in fact Smith's address.

If either of these facts was insufficiently proved the case of the Government necessarily fails. For obviously the defendant could not be held chargeable with perjury for being unwilling to swear that he "*knew*" Smith's address and that he had been able to obtain Smith's address, if the only information which he had on the subject was incorrect.

Now, the only information which he is proved to have had on the subject is that which is established by his letter of August 3rd, 1909 (Exhibit 7), in which he speaks of "W. C. Smith of 384 St. Nicholas Avenue, New York."

If this information was not accurate, then there was *no* evidence that he *knew* Smith's address, and indeed he would have been reprehensible if he had sworn that he did know it.

And the only evidence that this was Smith's address is Smith's testimony:

> "I reside at 384 St. Nicholas Avenue, and have lived there two years.
>
> "Q. And did you live there in July, 1909? A. *I think so, yes.*"

So here again, not only was the jury permitted to convict upon the testimony of a single witness unsupported by additional evidence, but they were permitted to convict the defendant of perjury for being unwilling to swear that he "*knew*" an address when the only evidence that such

information as he had on the subject was accurate, was the testimony of one witness to the effect that he "thinks" that this was the address.

And, manifestly, apart from the fact that the defendant could not be convicted on the testimony of one witness, he ought certainly not be convicted for being unwilling to swear to an address which the alleged occupant was himself unwilling to be positive of.

It is appreciated, of course, that this question was not presented as definitely as might be desired either upon the trial or in the assignments of error, though there was a general motion to acquit and for the direction of a verdict (fol. 193), and there is an assignment based thereon (Assignment 31, fol. 298).

But the power of this Court and the Circuit Court of Appeals to reverse for error not raised upon the trial and not assigned, is undoubted.

Clyatt vs. United States, 197 U. S., 207, 221.
Crawford vs. United States, 212 U. S., 183, 194.
Wiborg vs. United States, 163 U. S., 632, 658.
Weems vs. United States, 217 U. S., 349, 362.

And we can conceive of no case in which it could be more appropriately exercised than one in which there is no evidence sufficient in law to justify the submission to a jury of the issue upon which a defendant has been convicted.

Clyatt vs. United States, 197 U. S., at p. 221.

And in any event the insufficiency of the legal evidence to justify a submission to a jury emphasizes the prejudice resulting from the admission of the illegal evidence heretofore and hereafter discussed.

V.

The examination before the commissioner upon which the first indictment was based, was without warrant in law, and it was error to receive any evidence under that indictment or to submit to the jury any charges presented by it.

The first indictment is based upon testimony given before a Commissioner under an examination held before him prior to the adjudication in bankruptcy.

Manifestly, if this proceeding was wholly unauthorized, no prosecution for perjury can be based upon testimony given in the course of it.

That such a proceeding is unauthorized and wholly void, has been held by the Circuit Court of Appeals of the Third Circuit, and by the District Courts in other Circuits,—

Podolin vs. McGelligan, 193 Fed., 1021 (C. C. A., Third).
Skubinsky vs. Bodek, 172 Fed., 332 C. C. A., Third Circuit).
In re Thompson, 179 Fed., 874 (Penn. D. C.).
In re Davidson, 158 Fed., 678 (Mass. D. C.).
In re Crenshaw, 155 Fed., 271 (Ala. D. C.).

though the contrary has been held by the District Court in this Circuit (*In re Fleischer*, 151 Fed., 81 (S. D., N. Y.).

We conceive no more persuasive argument for the invalidity of the proceeding than that found in the opinion of the learned Judge who wrote for the Circuit Court of Appeals of the Third Circuit, and we therefore quote from it:

> "It appears from the record that the order complained of was granted before Skubinsky made answer to the petition in involuntary bankruptcy, or in any manner raised an issue, either of law or of fact, with respect to its averments, and six days before the time fixed for the showing of cause why the prayer of that petition should not be granted, and thirteen days before Skubinsky was adjudicated a bankrupt. There are

three assignments of error, each of them challenging the legality of the order of special reference. The last reads as follows :

'That the learned Judge of the District Court erred in granting the special reference before the adjudication of the alleged bankrupt and before his estate was in process of administration.'

'Section 21*a* of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat., 552; U. S. Comp. St., 1901, p. 3430, as amended February 5, 1903 (Act Feb. 5, 1903, c. 487, Sec. 7, 32 Stat., 798; U. S. Comp. St. Supp. 1907, p. 1028), provides, among other things, as follows :

'A court of bankruptcy may, upon application of an officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct or property of the bankrupt whose estate is in process of administration under this act.'

'The authority conferred by this section to grant a reference for the purpose of throwing light on 'the acts, conduct or property of the bankrupt is limited to the case of one 'whose estate is in process of administration under this act.' While by virtue of Section 1 of the act the term 'bankrupt' may include a person against whom an involuntary petition has been filed as well as one who has been adjudged a bankrupt, Section 21 contains the significant and unambiguous words 'bankrupt whose estate is in process of administration under this act.' We do not think that the appointment and qualification of the receiver and his exercise of official functions before the adjudication of Skubinsky as a bankrupt and, indeed, before the return of the rule to show cause or the presentation of any issue of law or fact in the case, can be tortured into process of administration of his estate under the act. It did not appear when the order of special reference was made that he ever would be adjudged a bankrupt. The appointment of receivers in bankruptcy can be justified only where it shall be found 'absolutely necessary, for the preserva-

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tion of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' Such a receivership certainly up to the time of an adjudication is purely a precautionary measure. Until after an adjudication the function of a receivership is not administrative of the estate in bankruptcy, but solely preservative. And this is equally true whether receivers in bankruptcy are or are not authorized by the court to conduct the business of alleged bankrupts for limited periods. While such authority can be conferred upon receivers only 'if necessary in the best interests of the estates,' the granting of such authority and action thereunder prior to an an adjudication of bankruptcy can in no legitimate sense be deemed process of administration of the estate under the act.

It doubtless is true that a receiver may be authorized by the court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt; but such action on the part of the receiver before an adjudication does not constitute or involve 'process of administration under this act.' It is simply gaining control of the estate which is to be subjected to the process of administration if an adjudication of bankruptcy shall be made. If the appointment of a receiver before adjudication *per se* constitutes process of administration and no adjudication be made the remarkable result is presented of a process of administration, and consequently a partial administration, in bankruptcy, of the estate of the alleged bankrupt where absolutely no beneficial object or purpose of the bankruptcy act can by any possibility be effected. The special reference before adjudication to inquire into 'matters pertaining to the business and conduct of the alleged bankrupt,' was premature, inquisitorial and not to be tolerated. Common fairness requires that the alleged bankrupt before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt.

we are not aware of any provision in the bankruptcy act when fairly construed which justifies the order of special reference now before us."

Skubinsky vs. Bodek, et al. (Circuit Court of Appeals, Third Circuit), 172 Fed. Rep., 332, at pp. 334–335.

VI.

Prejudicial error was committed in the admission and exclusion of evidence.

(*a*)

The Court erred in admitting the evidence of the witness Leonard Smith, as to his efforts to obtain the address of W. C. Smith.

Leonard Smith, who was the attorney for the Trustee in Bankruptcy, was called and was permitted to answer the following questions over the objection and exception of the defendant (p. 26) :

"Q. Mr. Smith, were you able to ascertain from the record in this case—that is, the testimony given by Albert B. Cameron, the address of William C. Smith?

"Q. Did you find out where William C. Smith was from some other source? A. Yes, I did.

"Q. Mr. Smith, did you examine the papers on file in the office of the Distriat Attorney for the Southern District of New York to ascertain whether or not the address of William C. Smith, the petitioning creditor, appeared on those papers? A. I read the testimony that was given by Albert B. Cameron in which he stated that William C. Smith lived somewhere on St. Nicholas Avenue above 125th Street.

"Q. Now, what efforts did you make to locate William C. Smith after you had read that testimony? A. Besides examining Mr. Albert B. Cameron, the first

thing that I did was to examine the papers on file in the United States District Court in the bankruptcy proceedings, which I did during the first few days of September of 1909. Then I wrote a letter to Messrs. Meyers & Goldsmith, who were—(p. 27)

"Q. Did you inquire of Meyers & Goldsmith who were the attorneys for the petitioning creditor? A. I had several—

"Q. Were you able, Mr. Smith, to ascertain from Meyers & Gold-smith, the attorneys for the petitioning creditors, the address of William C. Smith? A. No, I was not.

"Q. Where did you find the address of William C. Smith? A. I found it out from a letter from the Wulscher, Stewart & Co.

"Q. Addressed to you? A. No, it was addressed to Mr. de Rochemont, the trustee" (p. 27).

And thus there was injected into the case suggestion of fraud and concealment, not only on the part of defendant but on the part of W. C. Smith's attorneys, and of collusion in that concealment between the defendant and Smith's attorneys, which could not but operate to the defendant's prejudice. The evidence was plainly immaterial. It was properly objected to and assigned as error (pp. 26 and 27, assignments of error 15, 16, 17, 107, 108, 109, 110); and since it was clearly prejudicial, it should have lead to a reversal of the judgment.

(*b*)

It was error to admit the conversation between the defendant and De Rochemont, tending to show that two months after the giving of the testimony the defendant knew Smith's address.

The defendant's testimony as to his ignorance of Smith's address was given on November 9th, 1909 (p. 18).

The Government was permitted to prove a conversation between the defendant and one de Rochemont held January 21st, 1910, two and a half months later, (p. 29). Two versions of that conversation were given—one

by de Rochemont and the other by one Govers, who was present at the time. According to de Rochemont, the defendant admitted on this date that at some time previous—which was unspecified—he had known Smith's address, but had withheld it from de Rochemont upon the advice of his counsel (pp. 29, 30). According to Govers, there was no admission by the defendant that he then knew, or at any other time had known, Smith's address (fols. 31, 32), but merely a statement that he had intended to give it to de Rochemont (*i. e.*, to procure it for him) and had been advised by counsel not to (p. 31).

Manifestly, the defendant's knowledge of the address at a period subsequent to his testimony tended in no way to establish that he had that knowledge when he testified, and hence the evidence was clearly irrelevant and improper.

On the trial the question was raised, both by objection to the testimony put upon the specific grounds now urged (pp. 29, 30, 31) and by motion to strike out put upon the same ground (p. 32), and the errors have been assigned (Assignments 21, 22, 23).

Nor can this error be said to have been cured by de Rochemont's subsequent testimony, upon having been recalled, to the effect that on prior occasions the defendant had promised to furnish the address, and that one of those occasions was "right after the petition was filed" (p. 32). For, in the first place, the promise to send the address on those prior occasions manifestly not only did not import a knowledge of it, but indicated that the defendant was ignorant of it, since the context of the conversation, as given, indicated that he would have to procure it (p. 32), and in the second place the time fixed is too indefinite.

To qualify the conversation it was incumbent upon the Government to fix it as having occurred prior to the giving of the testimony, and unless it was so fixed it was irrelevant. "Right after" might mean a month, two months or four months, according to the witness's conception of time; and while it is possible to guess that by "the petition," the witness meant the original petition in Bankruptcy, he might perfectly have meant some petition on an incidental application in the course of the proceedings. Hence, the date of this original conversation is left to pure speculation, and it serves

in no way to qualify the error involved in the admission of the later conversation, which was concededly subsequent to the defendant's testimony.

(c)

It was error to limit the cross-examination of the witness William C. Smith, as to his conversations with the defendant's brother.

The testimony of William C. Smith was the sole contradiction of the defendant's testimony as to the sale of the pianos. It was, therefore, of especial importance to the defendant that he be permitted to cross-examine him, both as to his transactions with the Piano Company and its officers, and for the purpose of affecting his credibility.

Surely, the defendant was entitled to show if he could that on some prior occasion he had testified to an arrangement, whereby either actually or colorably pianos had been sold to him by the Company. Such an arrangement, though it would not tend to establish the truth of the defendant's testimony as to his conversations, would tend to establish the truth, or his belief in the truth, of his testimony that pianos had been sold to Smith ; and manifestly he was entitled to such facts bearing upon that issue as he could get from legitimate cross-examination of the Government's witness.

To that end the counsel for the defendant sought to read to the witness an excerpt from testimony previously given by him, which, so far as counsel was permitted to proceed, tended to show that the witness had made an arrangement with defendant's brother whereby he authorized the defendant's brother " to buy pianos in his name " (p. 24).

When he had proceeding thus far, he was interruped by an objection from the learned United States Attorney, put on the ground of incompetence, irrelevance and immateriality. In response to the objection, the defendant's counsel pointed out the issues to which it was relevant, substantially as above. But the objection was sustained, the Court holding that on that issue he would have to make the witness his own (p. 25).

Later, when the defendant's counsel called the witness and

attempted to press him as to the details of this conversation, the Court interrupted with the following questions (p. 36):

> "Q. Well, anything different than what you said before? (p. 36).
>
> "Q. Can you tell anything that you have not already told?" (p. 37).

and upon receiving a negative answer from the witness, excluded the questions (37).

Further, when the defendant's counsel sought to show the bias of the witness by asking him as to his relations with the District Attorney, the Court of its own motion excluded the question (p. 37).

Thus the defendant was prevented from getting at the facts on cross-examination, on the theory that it was part of his own case, was prevented from developing them on direct examination when he made the witness his own, and was prevented from showing bias on the part of the witness so as to be permitted to refresh his recollection and properly to press him as his own witness.

It seems clear that the matter is a proper subject of inquiry, and hence that its exclusion was prejudicial.

In Conclusion.

It is respectfully submitted that the judgment of conviction should be reversed.

HOWARD S. GANS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 165.

ALBERT B. ~~CANNON~~ CAMERON,
Petitioner,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER IN REPLY TO THE BRIEF FOR THE UNITED STATES.

HOWARD S. GANS,
Counsel for Petitioner,
233 BROADWAY,
New York City.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1913.

ALBERT B. CANNON,
Petitioner,

vs.

THE UNITED STATES.

Brief for Petitioner in Reply to the Brief for the United States.

In the main the arguments advanced in the Government's brief have been anticipated, and, if our logic is sound, have been met in our brief in chief, but some of the Government's contentions serve to define the issues so sharply that a specific and direct reply to them may serve to crystalize the argument in favor of the petitioner. Hence a brief discussion of some of the Government's contentions will be undertaken.

I. It is argued that since Section 860 was a prohibition against the "use" of the testimony, its operation (so long as it was effective) was solely to prevent the "use" and that the moment it was wiped out no obstruction remained against the "use" (p. 6).

If this argument were sound it would apply equally to such statutes as the act of February 11, 1893, and the other similar statutes referred to in the report of the Judiciary Committee (pp. 32 *et seq.* of the Government's brief). The prohibition in those statutes is against prosecution "for or on account of any matter or thing * * * concerning which" the witness may testify. "And the moment such an act was wiped out"—if the process of reasoning adopted by the Government were sound—"no obstruction would remain against the" prosecution.

Yet if such reasoning were sound those acts would have been ineffective since, obviously, a revocable promise not fo

prosecute, would not furnish the "complete immunity" which alone suffices as a substitute for the constitutional guarantee. Hence it would seem clear that the determination of the question may not rest upon or be influenced by purely formal and scholastic logic of this character.

II. It is argued that the report of the Senate Judiciary Committee on the submission of the repealing act and the absence of any reference therein or in the repealing act to rights acquired under the act, indicates an intention that the rights or privileges secured by those who had given their testimony while the act was in effect and in reliance upon its provisions, should be abrogated.

But the same argument might be made with equal cogency if a committee of Congress were to report that the Act of February 11th, 1893, resulted chiefly in securing immunity for the very persons whose prosecution was demanded by the public interests; that hence it served no useful purpose and should be repealed, and if on the bringing in of such a report, that Act should be repealed without a saving clause.

Yet no one would doubt, that under such circumstances the saving clause would be implied.

III. It is argued that the immunity guaranteed by the section is a "gratuity," and that for this reason the guaranty may be violated without injustice—that is to say, that the Government, like a knavish tradesman, intends to fulfill only those promises that are founded upon a legal consideration and unescapable in a court of law. The contention would impute dishonor, even if the premise were sound; but if a *quid pro quo* be necessary to induce the Government to observe its pledges, it is manifest that the witness has "bound the bargain" by surrendering the higher and more effective protection which the constitutional guaranty afforded him, in exchange for and in reliance upon the smaller measure of protection which the statute guaranteed him.

It would seem, therefore, that an analysis of the results flowing from the propositions urged by the Government serves only to confirm the view that the Congress could not have intended and did not intend

in the Repealing Act to affect the rights of those who had given their testimony before the Repealing Act became effective and that the issues of law arising in this case must be governed by the provisions of 860 of the Revised Statutes. This conclusion is of importance, because though the provisions of the Bankruptcy Act provide, as is pointed out both in our brief in chief and in the Government's brief, a somewhat similar immunity,—those provisions are subject from their context to construction which cannot be applied to the provisions of Section 860.

IV. In view of the argument advanced by the Government as to the construction of Section 860 of the Revised Statutes it may be clarifying to repeat that the evidence admitted upon the trial in violation, as we claim, of that section falls into several distinct classes to which different constructions may be applied.

1. The testimony given in the proceeding before the *commissioner* which was unrelated to any of the assignments of perjury based upon the testimony given in that proceeding and which tended to contradict the testimony given before the *referee*, which was assigned as part of the perjury committed in that proceeding (see pp. 11–13 of our brief in chief).

2. The testimony, other than that assigned as perjurious, given in the proceeding before the commissioner and introduced to throw light on the intent with which the testimony assigned as perjurious was given in that and in the subsequent proceeding (see pp. 20, *et seq.*, of our brief in chief).

The testimony of the first class presents the question whether, under the provisions of section 860, it is permissible to read in evidence testimony obtained in *one* proceeding for the purpose of establishing that contradictory testimony given in *another* proceeding was false.

In order to sustain the admissibility of testimony under such circumstances, it is obviously necessary so to construe Section 860 as to hold that the sweeping prohibition against the use of testimony for incriminating purposes contained in the body of the second is by the proviso rendered *totally inapplicable* to the crime of perjury, so that while if a man admit in the course of his cross-examination upon a civil

trial that he committed a murder within the jurisdiction of the Federal courts, his admission may *not* be read in evidence on his trial for that murder; yet if under similar circumstances he admit that he committed perjury in a bankruptcy proceeding, the admission may be used in evidence against him. But manifestly neither the language of the statute nor the context leave room for such a construction. The proviso simply declares that the witness shall not be exempted from prosecution and punishment for perjury committed in testifying "as aforesaid." It does not enact that his testimony shall, in contravention of the prohibition contained in the body of the statute, be subject to be read against him on a trial for perjury committed—*not* "in testifying as aforesaid" but in testimony given on some other occasion.

Indeed, even the immunity provisions of the Bankruptcy Act (printed in the Government's brief, p. 4) in the narrowest and most restricted interpretation that has or can be given to them, would not permit such use of testimony obtained in a bankruptcy proceeding. For we take it that if an involuntary bankrupt who had verified schedules involving false statements were upon his examination in the bankruptcy proceedings to admit their falsity, no one would contend that the admission thus obtained could be given in evidence upon a charge of perjury based upon the falsity of the schedules.

The question which arises by reason of the testimony of the second class is whether the *proviso* makes it lawful to introduce in evidence not merely the testimony constituting the corpus of the perjury, but any and all other testimony given in the same proceeding at however a remote time, which tends to contradict the witness, or is relevant as bearing upon the wilfulness of his false swearing, or emphasizes its materiality.

On this question, as we have endeavored to establish in our brief in chief, the language of the statute would seem to have no room for question.

The policy of the act seems clear beyond the possibility of doubt. An offender is not to be convicted out of his own mouth—by the production of evidence obtained from him in court—though the prosecution is not to be debarred from proving that he gave testimony when it is claimed that that testimony is false.

In the Government's brief it is urged that we concede too little or too much, and that if by virtue of the proviso there is reserved the right to prove that a witness testified to matter alleged to be false, it follows that there is reserved the further right to prove, through his own testimony, that it was false, that it was material and that it was wilful; and it is confidently asserted that there is no basis for the distinction which we have sought to draw (p. 12).

The answer is found in the words of the enactment and of the proviso. No testimony given by a witness may be used against him provided that this prohibition shall not "exempt him from prosecution and punishment for perjury" in testifying falsely. If testimony alleged to be false could not be used, to the extent of establishing that it had been given, the corpus of the offense could never be proved, it would be impossible even to initiate a criminal proceeding based upon false testimony and the witness giving the testimony would thus be "exempt from prosecution" for the perjury. Hence such use is, by the express terms of the proviso, authorized. But the exclusion of testimony given by him in the same proceeding tending to establish the materiality or wilfulness of the matter charged to be false, while it renders the task of the prosecutor more onerous, *does not* exempt the witness from prosecution, since these elements of the offense are susceptible of proof *aliunde*, and hence, by the express terms of the enactment, such testimony is excluded. The distinction is made by the statute. It is not of our making.

V. Finally an argument is based upon an excerpt from the opinion of this court in Glickstein vs. United States, 222 U.S., 139, to maintain the proposition that the provisions of 860 serve to prevent the use of testimony only in prosecutions for criminal offenses committed prior to the giving of the testimony. To put it concretely the contention is that if A., called as a witness in a civil case, were to testify that B. had debauched his daughter, and on the following day B. were found dead and A accused of the murder, A's testimony might be read in evidence against him on the trial for murder as bearing upon the issue of motive, and that such use was not within the prohibition of 860, though if B had been murdered on the day prior to the giving of the testimony the

testimony would come within the provisions of the statute and might *not* be read against him. Certainly no such distinction is to be found in the language of the statute. It prohibits the use of his testimony in *any* criminal proceeding, *not* in such criminal proceedings as may be founded upon crimes alleged to have been committed prior to the giving of the testimony, and certainly no such distinction is necessary to sustain, or implied in the decision in the Glickstein case. That decision rests upon the absurdity of the contention that Congress in attempting to compel the giving of testimony should have given a license to testify perjuriously, by providing that false testimony given by a bankrupt could not be proved to have been given.

Nor is any support for the contention to be derived from the argument that, since the witness could not, under the constitution, decline to answer a question on the ground that it would tend to convict him of a crime to be committed in the future, therefore, he was not protected by the statute against the use of his testimony to establish the commission of such a crime.

For while section 860 was designed, in part, as a substitute for the constitutional provision, it represented a legislative policy in favor of a protection in some respects broader than that accorded by the constitution (Johnson vs. United States, 163 Fed., 30, 32, Mr. Justice HOLMES writing). It accorded a protection against the use of pleadings for incriminatory purposes, though, of course, the constitution affords no guaranty of immunity from prosecution for a crime revealed or proved by a complaint or bill in a civil action. It accorded immunity from the incriminatory use in the federal courts of testimony given in a state court, and even of testimony given in the courts of a foreign country, though neither the Federal constitution nor the state constitution recognized the validity of a claim of privilege based upon the possibility of incrimination in another jurisdiction (Jack vs. Kansas, 199 U. S., 372).

It represented manifestly a general policy of the law whereby pleadings and testimony given in court were to be excluded from the category of incriminatory evidence. It may well have been founded in part upon the underlying principle which furnishes the only sound justification for the constitu-

tional prohibition against compulsory self-incrimination; namely the realization that witnesses testifying under the stress and in the atmosphere of excitement involved in a court proceeding of whatsoever nature, are apt to be unnerved and are likely to fall into error, misstatement or confused or partial statements, which when taken from their context may create an appearance of guilt when in fact there is no guilt, and that there is at least equal danger of such prejudice in civil cases, where by reason of the nature of the issues, the mind of the witness is not directed to the possible incriminatory implications of his testimony; and the minds of counsel are not directed to the clarification of testimony with reference to such possibilities.

It may reasonably be presumed that the Congress when it enacted this statute deemed it unfair and conducive to oppression rather than to exact justice, that testimony given under such circumstances, whether in a court within the United States or elsewhere, should be subject to be read in evidence, and unjust that a defendant in a criminal case should be subjected to the burden of explaining or completing statements made in the course of litigations in which the issues had no relation to any offense, and the testimony was given without any realization of possible incriminating construction.

If this view of the policy of the law be sound it is clear that the prohibition would apply as well to the use of the testimony upon a charge of crime committed in the future as to its use upon a charge of crime committed prior to the giving of the testimony. Indeed if there were any distinction it would apply even more forcibly in the former than in the latter case, for the witness is obviously in a better position to realize the implications of his testimony with respect to a crime already committed and, with regard to such a crime, to guard against erroneous implications and misconstruction than he is to assure himself that his testimony may not be misconstrued into an admission of incriminating facts relative to some crime that may be committed in the future.

Moreover, unless we misapprehend the decision the Court of Appeals of the First Circuit and one of the justices of this Court stand as authority for the contention that 860 is not confined to prior offenses. In Johnson vs.

United States, 163 Fed., 30, 32, the indictment was for concealing assets from the trustee in bankruptcy. The gravamen of the offense lay—not in failing to include the assets in the schedule but in the subsequent omission to reveal them. The crime was consummated, therefore, *after* the schedules had been filed (163 Fed., p. 33) yet the Court held that the introduction of the schedule was prohibited by Section 860. In arriving at its conclusions the Court held further, that a broad and not a restricted construction must be given to the provisions of that section.

> "A statute may indicate, as its justification a change in the policy of the law, although it expresses that change only in the specific cases, most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: 'We see what you are driving at but you have not said it and, therefore we shall go on as before.'
>
> "This section of the Revised Statutes goes beyond and outside of the Fifth Amendment. It applies even to a sworn bill or answer in chancery what is said to be rule of the common law that pleadings are not evidence against the party concerned (Langdells Eg. Pl., 33; Boileau v. Rutlin, 2 Ex., 665). It makes this a general provision and its objects seems to be clear. We think the object was to prevent the required steps of the written procedure in court preliminary to a trial from being used against the party for whom they were filed.
>
> Johnson vs. United States, 163 Fed., 30, 32.

V. Finally it is to be observed, on this point that decisions as to the construction of the Bankruptcy Act, such as that in Glickstein vs. United States (*supra*) have little bearing on the question here at issue. For the section of the of Bankruptcy

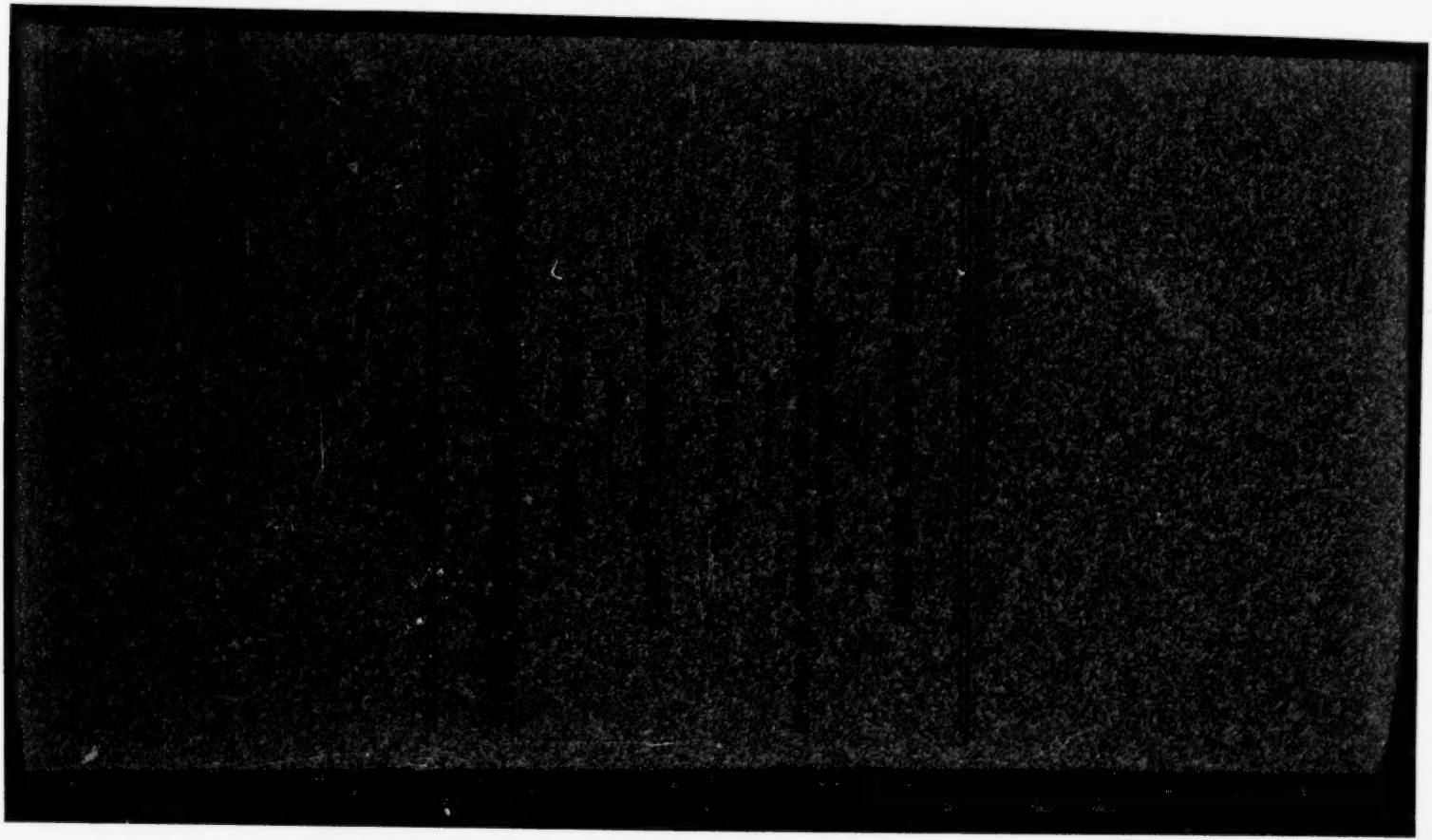
Act is subject to be read in connection with the statute of which it forms a part, and as to it, it can therefore be argued with much force, that the criminal proceedings referred to in the section and to which the prohibition against the use of testimony is restricted are such as might arise out of the conduct of the bankrupt's business, the disposition of the property and other transactions about which alone the statute authorizes the examination (*cf.* Edelstein vs. United States, 149 Fed., 636, 643). But the provisions of Section 860 are not subject to be thus restricted. It was a statute of general application, applying to testimony obtained from a witness by means of a judicial proceeding, conducted anywhere in the habitable globe, and irrespective of the subject to which that proceeding might relate or to the restriction or lack of restriction of its scope. It applied as well to civil actions as to criminal suits and proceedings, as well to judicial inquiries offering no inkling of incriminatory possibilities as to those directed to the discovery of a crime. Its operation could not be restricted to any particular class of criminal proceedings, because neither its language or its context offered any basis for restriction or discrimination. If it applied to any it necessarily applied to all criminal proceedings of whatsoever nature and whenever instituted.

VI. Authorities to the effect that a witness who has testified *in his own behalf* may not decline to answer on cross-examination, tending to prove that he has testified falsely, or that the testimony volunteered by a witness may be used against him at a subsequent stage of the same proceeding tend in no way to affect the question here at issue. Such testimony is not "obtained" within the meaning of the statute, and hence its use is not prohibited by the statute.

Respectfully Submitted,

HOWARD S. GANS,

Counsel for Petitioner.



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I. There is considerable doubt as to whether the point is raised by the facts, but owing to the importance of the question it will be argued 3

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Balt. &c., R. Co. v. *Grant*, 98 U. S. 398.
Ewell v. *Daggs*, 108 U. S. 143, 150.
Hopt v. *Utah*, 110 U. S. 574.
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Cf. *Legal Tender Cases*, 12 Wall. 457.

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Daniels v. *U. S.*, 196 Fed. 459.
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Glickstein v. *U. S.*, 222 U. S. 139.
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Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391.
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Nor does it prohibit the admission of testimony before the commissioner to sustain the charge before the referee, and *vice versa*, since both examinations were part of the same proceeding 13

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The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of 1841 and 1867 and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. 332 15

Ex parte Bick, 155 Fed. 908.
Ex parte Lee, 15 Fed. Cas. 8, 178.
In re Fixen, 96 Fed. 749.
In re Fleischer, 151 Fed. 81.
In re Salkey, 21 Fed. Cas. 12, 252.
U. S. v. *Wechsler*, 16 Am. B. R. 1.
U. S. v. *Liberman*, 176 Fed. 161.

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See:

Dissenting opinion of Judge Buffington in *Skubinsky* v. *Bodek*, 172 Fed. 332, *supra*.

10 Columbia Law Rev. 70.

23 Harvard Law Rev. 221.

Loveland, Bankruptcy (3rd ed.), §204.

II. Even under section 21a of the bankruptcy act the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed. 18

In re Fleischer, 151 Fed. 81, *supra*.

Dissenting opinion of Judge Buffinton in the *Skubinsky* case, 172 Fed. 332, *supra*.

III. Independently of section 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by section 2 (15), and the concluding paragraph of the section 21

Blake v. *Francis-Valentine Co.*, 89 Fed. 691.

In re Cohen, 136 Fed. 999.

In re Lacov, 142 Fed. 960.

In re Levi and Klauber, 142 Fed. 962.

In re Union Trust Co., 122 Fed. 937.

White v. *Schloerb*, 178 U. S. 542.

IV. This construction, being therefore possible, both under section 21 (a) and under the general equity power, should be accepted, because the other view leads to the result that no witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication. 25

See:

Craddock-Terry Co. v. *Kaufman*, 175 Fed. 303.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ALBERT B. CAMERON, PETITIONER,
v.
THE UNITED STATES.
No. 165.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The opinion below is reported in 192 Fed., 548:

FACTS.

No serious question can be made that the facts of the perjury were proved beyond doubt. The petitioning creditor never really had any business transactions with the bankrupt, but allowed the use of his name at the bankrupt's request (pp. 24, 25, 36). Also the same man was used as ostensible purchaser of certain pianos, immediately before the filing of the petition, evidently in an effort to get them beyond the reach of the creditors (p. 51), in support of which effort the bankrupt attempted to maintain the *bona fides* of the sale, and attempted also to conceal the

whereabouts of the alleged purchaser (pp. 32, 29, 30, 31, 20–21).

The perjuries were subsidiary to this general plan.

THE QUESTIONS.

Three principal points are made as grounds for reversal:

(1) That in proving the perjury (under both indictments) there was error in not limiting the proof of the bankrupt's testimony to the actual false statements charged as perjury.

(2) That the falsity of the statements was not adequately proved.

(3) That the false statements before the special examiner (the first indictment) were not perjury, because, as is claimed, there is no authority to take evidence prior to the adjudication, even for the purpose of locating and conserving the property incident to the receivership.

FIRST POINT.

SECTION 860, R. S., WAS REPEALED BEFORE THE TRIAL AND DOES NOT APPLY; BUT NEITHER IT NOR SECTION 7 A-9 OF THE BANKRUPTCY ACT GAVE ANY PRIVILEGE AGAINST THE USE OF THE FACT OF SELF-CONTRADICTION AS PART OF THE PROOF OF PERJURY.

In principle, we think this question is covered by the reasoning of *Glickstein* v. *U. S.* 222 U. S., 139, but the actual decision of that case was only that the testimony assigned as the *corpus* of the perjury may be used, and it did not raise the precise point asserted here, which is:

That neither self-contradiction, nor intent, nor materiality, nor, in short, anything but the mere saying of the falsehood may be shown by using the perjurer's testimony.

I. The facts raising the question.

There is considerable doubt whether the point is raised by the facts. The court below thought not, holding the testimony offered to have been merely a part of the *corpus* of the perjury; and it is fair to say that a reading of the testimony itself *in extenso* (pp. 13–20) confirms their construction as substantially correct.

Still, by a microscopic study, the appellate counsel has discovered four shreds of testimony which, when isolated, do seem to raise his point; and we are not disposed to scrutinize the matter too strictly, because the question is most important to the due protection of the witness stand and ought to be settled.

II. The statutes and the repeal of section 860, R. S.

A second preliminary matter requires to be noted before we proceed to the argument on the merits.

Section 860, R. S., provides as follows:

> SEC. 860. (Pleadings, disclosures, etc., not to be used in criminal proceedings.) No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the

> enforcement of any penalty or forfeiture: *Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.*

Section 7, a–9, of the bankruptcy act provides as follows:

> When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; *but no testimony given by him shall be offered in evidence against him in any criminal proceeding.*

Both these statutes were relied on at the trial (p. 14) and in counsel's brief here, but counsel has chosen to plant himself mainly on section 860, touching the other very lightly (brief, p. 36). The difference is that section 860 contains a proviso upon the form of which counsel bases an argument, but which is not in the bankruptcy act.

The two acts were assimilated by the *Glickstein* case, and we do not consider the difference really important, but if it be important, the case must rest exclusively on the bankruptcy act, because of the repeal of section 860.

The repealing act (enacted May 7, 1910, 36 Stat. 352) read simply as follows:

> *Be it enacted*, That section eight hundred and sixty of the Revised Statutes of the United States be, and the same is hereby, repealed.

The effect of this repeal is sought to be avoided for the reason that, though the testimony was *used* after the repeal (the trial being on November 10, 1910, p. 18), it *originated* before (i. e., October 28, 1909, p. 8), and it is urged that the repeal intended to save the operation of the act as to such testimony.

There was no express saving clause, and counsel, of course, concedes the general rule that, in the absence of the clause, changes in matters of procedure ordinarily apply instantly and as well to pending as to future cases.

Hopt v. *Utah*, 110 U. S. 574:

> Repeal of act incapacitating felons from testifying.

Ewell v. *Daggs*, 108 U. S. 143, 150:

> Repeal of statute giving defense cf. usury.

Kans. P. R. Co. v. *Twombly*, 100 U. S. 78, 81:

> Repeal (pending writ of error) of statute creating right.

Balt., &c., R. Co. v. *Grant*, 98 U. S. 398:

> Repeal of jurisdiction.

Wilkinson v. *Nebraska*, 123 U. S. 286:

> Same.

McNulty v. *Batty*, 10 How. 72:

Same.

South Carolina v. *Gaillard*, 101 U. S. 433:

Repeal of act giving remedy.

Cf. *Legal Tender cases*, 12 Wall. 457:

Legal-tender laws apply to prior debts.

The form of section 860 and of the repealing act make it peculiarly impossible to imply a saving clause here without violence to the language chosen by the Legislature. The original section was a prohibition against any "use." It was addressed to the time of the later profferred "use" and not to the time the testimony was given in the first instance. Its operation (so long as it was effective) was solely to prevent the "use," and the instant it was wiped out no obstruction remained against the "use."

Counsel, however, argue that a saving clause must be implied, on a supposition that Congress could not have intended "so flagrant a breach of faith" and so "immoral" and "unjust" a result.

It suffices to refer to the report made on the repealing bill by the Senate committee (incorporating the similar report of the House committee), which shows conclusively that the very reason for the repeal was the absence of any such contractual obligation, because, as a result of *Counselman* v. *Hitchcock*, 142 U. S. 547, the immunity granted by the section had become a mere gratuity and a stumbling block to justice. The report is printed in full as an appendix, and it puts this proposition beyond controversy.

Re Hall, 167 U. S. 38, involved a somewhat similar destruction of a gratuity due to failure of consideration, and the court said:

> The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had power to do. *Merchants' Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544; *Ex parte McCardle*, 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85; *Baltimore & Potomac Railroad* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141.
>
> This court had just decided that the act of February 13, 1895, 28 Stat. 644 [the repealed statute], simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the act so repealed * * * (pp. 42–43).

There can be no question that Congress deliberately omitted the saving clause and intended to wipe out section 860 immediately and entirely.

III. There is no such immunity.

The question then is:

> In the prosecution of a bankrupt for perjury in the bankruptcy proceedings may the Gov-

> ernment use his testimony in those proceedings to prove other points of the charge than the mere text of the false statement itself?

This exact question has not been decided here, but it was decided, in favor of our position, in—

> *Daniels* v. *U. S.*, 196 Fed. 459 (C. C. A. 6th C).
> *U. S.* v. *Brod*, 176 Fed. 165 (C. C. Ga., Newman, D. J.), *semble*.
> Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391.

Both of these opinions are well reasoned, as is also the opinion in *U. S.* v. *Smith*, 47 Fed. 501, which arose, not in bankruptcy, but under section 860, R. S., before its repeal.

Glickstein v. *U. S.*, 222 U. S. 139, *supra*, though not deciding the exact point, is nevertheless based on reasoning which concludes this case, and it was so regarded by the Court of Appeals for the Sixth Circuit in the *Daniels* case, *supra*. The nub of the opinion is in the following passages:

> It can not be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony, Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guaranty *relates to the past* and does not endow the person who testifies with a license to commit perjury * * * (p. 142).

> The statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word (p. 143).

The court approved *Edelstein* v. *U. S.*, 149 Fed. 636, 641–644 (C. C. A. 8th C., Judge, now Mr. Justice, Van Devanter concurring), which also seems in its reasoning to cover this present case, and in which it was said:

> It would seem that the statute in question was not intended to confer a broader immunity, so far as it was applicable, than the constitutional provision does in its scope of operation. To hold that the statute protects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. * * * Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words "any criminal proceeding" can not sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They

obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify (pp. 643–644).

The opinions in these cases cover the question so thoroughly and so compactly that we will not elaborate the argument, except to bring it into relation with the particular points made by counsel.

Much of his argument is based upon the peculiar phraseology special to section 860 and not repeated in the bankruptcy act. It therefore does not bear on this case. The proposition is that the proviso of 860 expressly deals with the subject of perjury prosecution, but instead of excepting that kind of prosecution from those in which the use of the testimony is prohibited it merely reserves the right to prosecute. The argument, however, proves too much, for it would equally prevent the use even of the testimony which is concededly usable under the *Glickstein* case.

But, anyway, as stated, the argument is founded upon the peculiar language of section 860 and is inapplicable.

The second argument advanced is that Congress can not have intended to permit the "*general use*," so called, of the testimony (even in prosecution for perjury in the same proceeding), because, it is argued, that would nullify the purpose of the statute by throwing the door open "to every witness on every trial to refuse his testimony through a valid assertion

of his claim [of privilege] against incrimination," i. e., because "a *truthful* answer to the question may show that his *prior* testimony was erroneous." (Brief, p. 9.)

Here, again, the argument proves too much, for it also hits even the conceded extent to which the testimony may be used. If *true* statements by a witness are privileged as tending to incriminate him (as argued, brief, p. 9), the proof of the *false* statements must be even more directly a violation of that privilege.

But of course there never was any constitutional privilege open to a witness against being compelled to contradict himself. When was any witness ever so bold as to claim, when driven into a corner on cross-examination, that he was privileged against further testifying because he would have to reveal a perjury committed on the direct? (Cf. *Powers* v. *U. S.*, 223 U. S. 303, 316.)

This is the essential difficulty with petitioner's whole case—it disregards in particular the character and purpose of cross-examination, and in general the difference between self-incrimination and crimes by witnesses on the witness stand.

And this, if we understand it, is the purport of the *Glickstein* case. The immunity was intended to be given in relation to "past" offenses (those to which the privilege against self-incrimination relates) [1] and

[1] See *U. S.* v. *Swift*, 186 Fed. 1002, which held that the immunity against prosecution under the antitrust act did not extend to *future* crimes.

not to misconduct on the stand itself. In other words, it was not intended to modify the duty of a witness or the usual course of prosecution for breach of that duty. To so construe it would be to assume that while granting indulgence for the sake of getting testimony, Congress intended to withdraw the usual safeguards which make testimony truthful and of value; in other words, as the court said, to grant "a license to perjury."

But, at this point, it is argued, finally, that the *necessity* of saving the power to prosecute for perjury is satisfied by implying a right to use the testimony charged as false, and does not extend to a "general use" of the correlated testimony to show intent, the truth, materiality, absence of mistake, and such other incidents to proof of perjury.

There is no basis in the statute for such a distinction. Its purpose, as we have said, is to deal with crimes as to which a constitutional privilege could have existed or could have been asserted (cf. *Heike* v. *U. S.*, 217 U. S. 423) and not to deal at all with violations of the duties assumed by the witness when taking the stand. There is nothing whatever in the statute that justifies a limitation upon the conventional (and constitutional) methods of proving perjury, which have always included proof of self-contradictions on the witness stand.

U. S. v. *Wood*, 14 Pet. 430, 440.
State v. *Broughton*, 7 ~~Ired.~~ Ired. 96.

Nor would the petitioner's case be much advanced if his proposition were correct and the statute were

regarded as excepting only such proof as is "necessary" to establish perjury, rather than as excepting the business of prosecuting for perjury. To be sure, there is no other way of showing that a defendant spoke falsely than by showing that he spoke falsely; but there is, practically at least, no other way of showing that he *intended* inside his mind to speak falsely than by showing that he reiterated it and stuck to it under pressure, or of showing the *materiality* of the perjury than by showing the course of the testimony and the pleadings (which, on petitioner's argument, would be equally privileged for this "general purpose"); and the historic and usual and most practicable and, nine times out of ten, the *necessary* way of providing the *quantum* of proof requisite to show the falsehood, is by proof of inconsistencies and contradictions in the testimony itself.

Among these various degrees of "necessity" there is no one more likely than another to have been over the line if Congress had intended to draw one, and there is no reason apparent for implying the line at one place rather than another.

The simple fact is that Congress never intended to affect the existing law about prosecutions for perjury at all.

All this testimony, whether before Commissioner Alexander, as special master, or before the referee, was in the same proceeding, if that makes any difference. (*Powers* v. *U. S.*, 223 U. S. 303.)

SECOND POINT.

THE EVIDENCE SUPPORTED THE VERDICT.

It was argued (pp. 37–39) that there was not sufficient evidence to support the findings of perjury as to the sale of the pianos, the conversation with respect thereto, and the address of Smith.

No such claim was made on the trial, the motions to take from the jury being only for an alleged variance and for alleged failure of proof of materiality (pp. 38, 39).

There is no exception to raise the point.

But Smith's testimony (pp. 21–25, 36) that the whole thing was fictitious was amply corroborated, among other things, by Rochemont's testimony as to the efforts of the defendant to conceal the whereabouts of Smith from the trustee (pp. 29–32) and the testimony of Govers to the same effect (p. 31).

THIRD POINT.

THE EXAMINATION BY THE COMMISSIONER AS SPECIAL EXAMINER WAS DULY AUTHORIZED, AND THE FALSE TESTIMONY THERE WAS PERJURY.

If either of the two preceding points involves reversible error, the judgment must fall, irrespective of what may be thought on this point, because they cover both of the two consolidated indictments, unless, as is possible, the basis of fact on the immunity point is deemed insufficient to raise the question under the indictment for perjury before the special examiner. It certainly is rather more flimsy than under the other indictment.

On the other hand, if our position upon these two points is sound, the judgment must be affirmed, likewise irrespective of what may be thought on this point, because this concerns only the indictment for perjury before the special examiner (the first one) and leaves unaffected the indictment for perjury before the referee (the second one), and that alone is sufficient to support the judgment.

Claassen v. *U. S.*, 142 U. S. 140.
Evans v. *U. S.*, 153 U. S. 584 and 608.
Goode v. *U. S.*, 159 U. S. 663.
Powers v. *U. S.*, 223 U. S. 303, *supra*.

Nevertheless, we hope it may be decided, because there are conflicting decisions in the Courts of Appeal, and the question is extremely important.

I. The facts.

The examination criticized was held after petition filed, and after the appointment of the receiver, and for the purpose of preventing the concealment of assets from him and to aid him in locating the assets.

II. The question.

The claim is that the order appointing the special examiner was beyond the power of the court because it was made prior to the adjudication.

III. The prior decisions.

The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of

1841 and 1867[1] and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. 332.

The authorities expressly supporting our position are—

Ex parte Lee, 15 Fed. Cas. 8, 178 (D. C. N. Y. 1842).

Bankrupt ordered to submit to examination before adjudication under act of 1841 (5 Stat. 440).

In re Salkey, 21 Fed. Cas. 12, 252 (C. C. Ill. 1873).

Same, under act of 1867 (14 Stat. 518).

In re Fixen, 96 Fed. 749 (D. C. Cal. 1899).

Same, under act of 1898.

In re Fleischer, 151 Fed. 81 (D. C. N. Y. 1907).

Same.

Ex parte Bick, 155 Fed. 908 (C. C. N. Y. 1907).

Writ of *habeas corpus* on behalf of a bankrupt who had given evasive answers upon examination before adjudication dismissed.

U. S. v. *Wechsler*, 16 Am. B. R. 1 (D. C. N. Y. 1905).

Jury charged that perjury might be committed during an examination before adjudication. Conviction affirmed, 158 Fed. 579 (C. C. A. 2d Circ.).

U. S. v. *Liberman*, 176 Fed. 161 (C. C. N. Y. 1910).

[1]But these acts did not contain the particular language relied on under the present act.

Indictment for perjury, alleged to have been committed by a creditor at an examination before adjudication, sustained.

See dissenting opinion of Judge Buffington in *Skubinsky* v. *Bodek*, 172 Fed. 332, *supra*.

23 Harvard Law Rev. p. 221.

10 Columbia Law Rev. 70.

Loveland on Bankruptcy (3d ed.), section 204.

Of the cases holding to the contrary *In re Thompson*, 179 Fed. 874 (D. C. Pa., 1910), and *Podolin* v. *McGettigan*, 193 Fed. 1021 (C. C. A., 3d Circ.), were both expressly grounded upon the decision in *Skubinsky* v. *Bodek*, 172 Fed. 332, a prior authority in the same circuit, while in *In re Crenshaw*, 155 Fed. 271 (D. C. Ala., 1907), and *In re Davidson*, 158 Fed. 678 (D. C. Mass., 1907), no receiver had been appointed, and the latter decision was put upon this specific ground, and thus distinguished from *In re Fleischer*, 151 Fed. 81 (D. C. N. Y., 1907). Thus the only decisions to the effect that the court can not examine witnesses at any time after the filing of the petition *and the appointment of a receiver* are the *Skubinsky* case and later decisions in the same circuit. Collier (9th ed., pp. 452–3) is in doubt but concludes against us, and Remington is against us (1 Bank., sec. 1543), though he recognizes the right to examine by means of "provisional remedies," as the establishment of a receivership or an application for an injunction.

IV. Even under section 21a of the bankruptcy act the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed.

The text of the section is as follows:

> A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. (32 Stat., 798.)

The words "whose estate is in process of administration under this act" are merely descriptive. There is nothing to show that they are intended as a limiting proviso equivalent to "provided that the order of adjudication has been made." Some such proviso would have been the normal way to express such a limitation, or the section would have begun with the words "As soon as an adjudication has been made, a court may," etc.; or if the present structure had been preserved, it would have said "a bankrupt," not "*whose* estate is in process of administration under this act," but "*if* his estate is in process," etc. This would be the natural method, considering that a "bankrupt" is such as soon as the petition has been filed. The sense of the passage is really equivalent to "a bankrupt *whose bankruptcy it is*."

In our view the "administration" by the court within the meaning of the word as used here attaches immediately upon the filing of the petition, and does not await the appointment of a receiver, and this is the weight of authority; but if there be a distinction as was thought in *Re Davidson*, *supra*, this case, of course, falls the other side and does not concern it.

The argument is thoroughly expounded in the opinion of Judge Hough in *re Fleischer*, 151 Fed. 81, *supra*, approved by the court below; and in the dissenting opinion of Judge Buffington in the *Skubinsky* case, 172 Fed. 332, *supra*.

Summarily it is as follows, as put by Judge Hough:

> To administer is "to control or regulate in behalf of others" (Cent. Dict.), and this is exactly what a receiver in bankruptcy does, and must do, with the property of one against whom a petition has been filed. It is the very object of his appointment to control and regulate, on behalf of the creditors of the alleged bankrupt, the property concerning which the investigation is to take place. (*In re Fleischer*, 151 Fed. 81.)

Judge Buffington, Jr.

> The word "administer" means literally to minister to, to serve, and surely preliminary preservation, getting trace of assets, preventing concealed goods from being spirited away; in other words, preventing the scattering and dissipating of property, so that there may be an estate to sell and distribute, is the very gist of administration. * * * We may rightfully use, of the administration of a bankrupt

court, *mutatis mutandis*, the language of the Supreme Court of Alabama in *Martin* v. *Ellerbe's Adm'r*, 70 Ala. 326, and say: "The term 'administration' includes more than the collection of assets and the payment of debts and legacies and distribution to the next of kin, and involves anything that may be done rightfully in the preservation of the assets of the estate, and which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights." * * *

The word "administration" is used in the bankruptcy act as descriptive of the entire proceedings dating from the time of the filing of the petition and the appointment of a receiver and not in the narrow technical sense as referring only to that part of the proceedings which commence after adjudication. In other words, the administration which proceeds from adjudication is simply the continuation of that which preceded adjudication. This is most clearly implied in section 22 (*a*), which provides: "After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate or may refer it." Proceeding with an administration implies that administration has already begun. Moreover, since by section 64 (*b*), the first item paid out of a bankrupt's estate is "the actual and necessary cost of preserving the estate subsequent to filing the petition," it is hard to say that the court, which was

preserving and keeping intact the property prior to the appointment of a trustee, was not administering. * * *

The act clearly makes no provision that the court's jurisdiction shall be divided into two periods, viz, a nonadministrative period prior to adjudication and an administrative one after adjudication. On the contrary, the whole tenor of the act is to regard the time from the filing of the petition to the close of the proceeding as an administrative whole. Thus section 1 (4) provides that the word "bankrupt" shall "include a person against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt"; clause 10, that the word "bankruptcy" "with reference to time, shall mean the date when the petition was filed." (Buffington, J., 172 Fed. 338.)

V. Independently of section 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by section 2 (15), and the concluding paragraph of the section.

Courts of bankruptcy are by section 2 "invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."

It has been held that the words "at law" in this provision were probably inserted to meet clause (4) of section 2, bankruptcy proceedings being in the nature of proceedings in equity. (*Bardes* v. *Hawarden*, 178 U. S. 524, 535.)

And the current of judicial opinion is apparently uniform to the effect that a court of bankruptcy sits also as a court of equity, "seeking to administer the law according to its spirit, and not merely by its letter."

In re Kane, 127 Fed. 552 (C. C. A., 7th Circ., 1904).

In re Union Trust Co., 122 Fed. 937, 940 (C. C. A., 1st Circ., 1903).

In re Levi & Klauber, 142 Fed. 962 (C. C. A., 2d Circ., 1905).

Matter of Brenner, 26 Am. B. R. 646 (D. C., Pa., 1911).

Ex parte Lee, 15 Fed. Cas. 8, 178 (D. C., N. Y., 1842).

Section 2 (15) provides that courts of bankruptcy are invested with jurisdiction to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

And it is laid down in the concluding paragraph of the section that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

That the combined effect of these three provisions is to allow bankruptcy courts extensive equity powers not elsewhere conferred by the act is the doctrine declared by the following cases:

In re Lacov, 142 Fed. 960 (C. C. A., 2d Circ., 1905).

Expenses of receivership put upon petitioning creditors where proceedings were dismissed and no adjudication ever took place.

In re Levi and Klauber, 142 Fed. 962 (C. C. A. 2d Circ. 1905).

Involuntary petition dismissed for want of prosecution by creditors on the analogy of an ordinary abandoned bill in equity against a debtor.

In re Union Trust Co., 122 Fed. 937 (C. C. A. 1st Circ. 1903).

Sale of bankrupt's property free from incumbrances ordered, although the equity was of a doubtful nature.

Blake v. *Francis-Valentine Co.*, 89 Fed. 691 (D. C. Cal. 1898).

Debtor enjoined from selling his property within four months after bankruptcy act of 1898 went into effect, even though no petition had been filed against him.

In re Cohen, 136 Fed. 999 (D. C. Ill. 1905).

Writ of *ne exeat regno* issued against a bankrupt, though application did not conform to the requirements of section 9 (*b*). To the same effect are *In re Lipke*, 98 Fed. 970 (D. C. N. Y. 1900), and *In re Berkowitz*, 173 Fed. 1012 (D. C. N. J. 1908).

White v. *Schloerb*, 178 U. S. 542 (1899).

Persons who had replevied, under process of a State court, property of a bankrupt in the custody of a bankruptcy court compelled to restore that property to its custody.

In the case of *In re Cohen*, *supra*, Judge Humphrey, in construing the powers granted by section 2, said (p. 1000):

> Section 2 defines the powers of a court of bankruptcy. In 19 subdivisions it enumerates in detail the necessary judicial powers which the legislative power could anticipate, and although the court is thus specifically clothed with these numerous powers, subdivision 15 is inserted in the following words [quoting the subdivision]. Here is a sweeping general delegation of power, evidently intended to supply any omission occurring in the various other subdivisions of the section as far as Congress could legally do so. It is clear that Congress intended by this language to give the court every necessary power. It could not give the power to legislate, or to extend the provisions of the act. No power can be exercised which does not clearly reside in the act. But Congress intended to give, and, in my judgment, the above-quoted language does give, every judicial power known to the law which the court may find necessary for the proper enforcement of the bankrupt act.

It follows therefore that where an examination of the bankrupt is "necessary for the proper enforcement of the bankrupt act," the court has ample authority to order it at any stage of the proceedings.

In re Fleischer, 151 Fed. 81 (D. C. N. Y. 1907).

In re Fixen, 96 Fed. 749 (D. C. Cal. 1899).

VI. This construction being therefore possible, both under section 21 (a) and under the general equity power, it should be accepted, because the other view leads to the result that *no* witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication.

It must be noted that section 21(*a*) applies not only to the bankrupt, but to *all* witnesses, and if it prohibits examination of the bankrupt, as claimed, it must also prohibit examination of every other witness.

The result of such a blinding of the court for all the time intervening between the institution of the proceedings and the adjudication tends, of course, to permit a fraudulent bankrupt to have his goods out of sight by the time the court is permitted to open its eyes.

The present case illustrates the situation as well as any. Here is a bankrupt concealing his property and even the address of the petitioning creditor, a receiver appointed by the court to take "possession of all property," etc. (p. 44), and "to do all and any such acts and take all and any such proceedings as may enable him forthwith to obtain possession of all and any such property" (p. 45); and a correlative command of the court to everybody "to turn over all such property to him" (p. 45), with the other usual requirements, and yet it is said the court has no power to examine *any witness whatever* as a means either of searching out the property or of preserving it.

For example, the rule that a receiver will be appointed only when absolutely necessary to preserve the estate (section 2 (3); Col. on Bank. (9th ed.) 36) requires that the bankrupt, as well as other witnesses, should at all times be available for examination in order that such necessity may be shown to exist. If an examination can not be held until after adjudication, it will be exceedingly difficult to obtain the appointment of a receiver, which is the only means open to creditors to prevent a dissipation of the bankrupt's estate.

And the practical necessity for immediate investigation in order to preserve the estate is most forcibly put by Judge Hough in *Re Fleischer*, as follows:

> The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud. (151 Fed., 81, p. 83.)

To the same effect are the remarks of Judge Chatfield in *U. S.* v. *Liberman*, 176 Fed., 161, at pp. 163, 164:

> The very purpose of an examination under section 21(a) is to discover the property of the bankrupt, or to learn as to its whereabouts and as to the acts of the bankrupt with respect thereto; and if the bankrupt could delay such investigation either by interposing an answer and thus preventing adjudication, or by delaying the filing of schedules and the calling of a first meeting, the property in many cases, at least in those in which fraud might be present, would be lost and beyond the reach of process or even discovery, and in such cases the services of a receiver would be substantially useless, for no knowledge would ordinarily be obtained until time for the election of a trustee, when what knowledge might be acquired would undoubtedly be too late to be of any service.

The dismay with which the doctrine of the *Skubinsky* case has been received in actual bankruptcy practice is illustrated also by the following extract from a referee's certificate presented to the court in *Craddock-Terry Co.* v. *Kaufman*, 175 Fed. 303 (D. C. Tex. 1909):

> Counsel for Mrs. K. (the bankrupt) objected to such examination upon the theory that, under section 21(*a*) of the bankruptcy act, prior to adjudication, an alleged bankrupt may not be required to submit to an examination, citing in support of their contention *In re*

Davidson and *Skubinsky* v. *Bodek*. To follow these decisions and the rules therein stated would defeat the majority of applications for receivers in involuntary cases, but I have been unable to find any authority to the contrary.

CONCLUSION.

The judgment should be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

FRANCIS H. MCADOO,
Attorney.

OCTOBER, 1913.

APPENDIX—REPORT ON REPEAL OF SECTION 860 R. S.

[Senate Report No. 502 (61st Cong., 2d sess.) on H. R. 16367.]

REPEALING SECTION 860 OF THE REVISED STATUTES.

APRIL 5, 1910.—Ordered to be printed.

Mr. CLARK, of Wyoming, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 16367.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 16367) to repeal section 860 of the Revised Statutes, beg leave to report the same back with the recommendation that the bill do pass.

The report of the Judiciary Committee of the House of Representatives, which is hereby concurred in, is as follows:

The Committee on the Judiciary, to whom was referred the bill (H. R. 16367) to repeal section 860 of the Revised Statutes, beg leave to report the bill back with the recommendation that the bill do pass.

Section 860, which the bill proposes to repeal, reads as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used

against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This section was enacted apparently for the purpose of enabling the Government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of Counselman *v.* Hitchcock (142 U. S., 547) it was held that legislation can not abridge a constitutional privilege, and that it can not replace or supply one, at least unless it is so broad as to have the same extent in scope and effect, and that said section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition, and that in view of the constitutional provision (article 5 of the amendments) a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.

Since the decision above referred to section 860 has possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice. Under it a witness can not be compelled to give any incriminating testimony whatever, but if he chooses to go on the witness stand and testify as to any matter whatever, even of his own volition, and, whether incriminatory or not, his testimony can not thereafter be brought up against him in any criminal proceedings. He can not be confronted with his own testimony or his own previous statement under oath even on cross-examination. The statute has become a shield to the criminal and an obstruction to justice.

The bill has the approval of the Attorney General, as will appear by a quotation from pages 22 and 23

of his annual report for the year 1909, which reads as follows:

"In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of Counselman *v.* Hitchcock (142 U. S., 547), held that this section was no substitute for the constitutional guaranty against self-crimination. As a result it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding. So far as I am aware no statute in any of the States protects a man who is charged with a crime from having used against him in a criminal proceeding testimony given by him in a civil suit. The United States attorney for the Southern District of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the bankruptcy act, to appear in court and testify in direct contradiction of what they may have deposed in the proceedings before the referee or examiner; but the Government is prevented by the above-quoted section from using such testimony against them."

The repeal proposed in no way deprives, nor could it deprive, the witness of the benefit of any constitutional privilege; other statutes passed and now in force furnish all necessary and proper protection and immunity.

In the interstate-commerce act of February 4, 1887, authority is given to the Interstate Commerce Commission to compel the attendance of witnesses and the production of evidence, and provides further:

The claim that any such testimony or evidence may tend to criminate the person giving such evidence

shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (24 Stat., 383.)

The above clause was reenacted in 1889 (25 Stat., 859) and again reenacted in 1891. (26 Stat., 744.)

Preceding the foregoing provision in the interstate-commerce act is a provision that any circuit court may issue a subpœna for a witness refusing to testify before the commission and require him to testify. Failure to obey may be punished as for contempt.

In the act of February 11, 1893, entitled "An act in relation to testimony before the Interstate Commerce Commission," etc., it is provided as follows:

But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. (27 Stat., 444.)

Under the act of February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," after providing for the compulsory attendance of witnesses it is provided:

The claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying, or such corporation producing its books and papers; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such proceeding. (32 Stat., 848.)

The legislative, executive, and judicial appropriation act approved February 25, 1903, under the heading "Department of Justice," after appropriating $500,000 for expenses of proceedings instituted under the interstate-commerce act and the Sherman antitrust act, continues:

Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (32 Stat., 904.)

In the act to establish the Department of Commerce and Labor, approved February 14, 1903, after giving the Commissioner of Corporations the power to make investigations of corporations, as to the management of their business, etc., it is (in sec. 6) further provided:

All the requirements, obligations, liabilities, and immunities imposed or conferred by said "act to regulate commerce," and by "An act in relation to testimony before the Interstate Commerce Commission," etc., approved February 11, 1893, supplemental to said "act to regulate commerce," shall also apply to all persons who may be subpœnaed to testify as witnesses or to procure documentary evidence in pursuance of the authority conferred by this section. (32 Stat., 828.)

In the "act defining the right of immunity of witnesses," etc., approved June 30, 1906, the immunity provided in certain acts therein mentioned was restricted to "a natural person who, in obedience

to a subpœna, gives testimony under oath," said act being in the following terms:

AN ACT Defining the right of immunity of witnesses under the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and an act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Approved, June 30, 1906.

In a letter to the chairman of the Senate Committee on the Judiciary with regard to the repeal of section 860 of the Revised Statutes the Attorney General says:

I think that section 860 of the Revised Statutes should be repealed. It is there provided that no

pleading of a party nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, provided that that section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying, as aforesaid.

In the enactment of this section, it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of Counselman *v.* Hitchcock (142 U. S., 547), held that this section was no substitute for the constitutional guaranty against self-incrimination and, therefore, that one could not be compelled to testify as to a matter that might incriminate himself, yet if he should see proper to do so, the testimony could not be used against him. The criminal, therefore, gets all the benefit of the act while the Government gets none; and the section is so comprehensive in its terms that it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding.

The United States attorney for the southern district of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the bankruptcy act, to appear in court and testify in direct contradiction of what they may have deposed in the proceeding before the referee or examiner, but the Government is prevented by the above-quoted section from using such testimony against them. Again, in cases where the defendant is arrested and testifies on a preliminary hearing before a United States commissioner giving there a version of the transaction, he may, when

brought to trial upon an indictment, take the stand in his own defense and tell an entirely different and conflicting story from that told by him before the commissioner, but the Government is prevented by section 860 from using any prosecution or previous conflicting statement made by him before the commissioner. I regard it, therefore, as a matter of vital importance to the Government that both of these modifications be made in the existing law.

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CAMERON *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 165. Argued October 21, 1913.—Decided January 5, 1914.

The estate of the bankrupt is in process of administration after the petition has been filed and a receiver appointed and an examination may be ordered at any time thereafter under § 21a of the Bankruptcy Act.

Section 7 of the Bankruptcy Act does not prevent a prosecution for perjury in the giving of testimony by the bankrupt; the immunity applies to past transactions concerning which the bankrupt is examined. *Glickstein* v. *United States*, 222 U. S. 139.

In the absence of clearly expressed legislative intent, retrospective operation will not be given to statutes; nor in absence of such intent will a statute be construed as impairing rights relied upon in past conduct when other legislation was in force. *Union Pacific R. R. Co.* v. *Laramie Stock Yards*, *ante*, p. 190.

Section 860, Rev. Stat., although repealed before testimony was used, if in force when the testimony was given, protected the giver thereof from having it used against him in a criminal proceeding.

The use of testimony given by the bankrupt in a hearing before a commissioner to contradict his testimony given before the referee, in a trial on an indictment for perjury in giving the latter testimony, violates the immunity guaranteed under § 860 Rev. Stat., and the use thereof is reversible error.

192 Fed. Rep. 548, reversed.

THE facts, which involve the immunity of one examined in a bankruptcy proceeding prior to the repeal of § 860, Rev. Stat., from having his testimony used against him, and the construction of §§ 7 and 21a of the Bankruptcy Act, are stated in the opinion.

Mr. Howard S. Gans for petitioner:

Under § 860, Rev. Stat., defendant was guaranteed against the reception in evidence against him of any part of the testimony given by him in either of the bankruptcy

proceedings, save that which in the indictment based upon that proceeding was assigned as perjurious.

Testimony given in the bankruptcy proceeding other than that assigned as perjurious was read in evidence to the defendant's prejudice.

Testimony given before the commissioner was used to prove the falsity of testimony given before the referee.

The prosecution was permitted to read testimony given before the referee which contradicted testimony given before the commissioner on a matter not assigned as perjurious in either indictment.

Testimony not assigned as perjurious was read as a basis for contradiction by the witness Smith, and thus the jury was permitted to consider further evidence that the defendant had sworn falsely in matters not assigned as perjury in either indictment.

The prosecution was permitted to read testimony not assigned as perjurious on the theory that it tended to establish his criminal intent.

The right to immunity from the use of this testimony was not affected by the subsequent repeal of § 860, Rev. Stat. *Lapham* v. *Marshall*, 51 Hun, 36, 41; *Sorenson* v. *United States*, 143 Fed. Rep. 820; *Bram* v. *United States*, 168 U. S. 532, 550; *Whitfield* v. *Aetna Life Ins. Co.*, 144 Fed. Rep. 356, 360; *United States* v. *Kirby*, 7 Wall. 482–486; *Chew Heong* v. *United States*, 112 U. S. 536–554; *Heydenfeldt* v. *Daney Mining Co.*, 93 U. S. 634, 638.

A construction which would involve for the Government the disgrace of a breach of good faith, will by every possible means be resisted. *United States* v. *Taylor*, 104 U. S. 216, 221; *Town of Red Rock* v. *Henry*, 106 U. S. 596, 604; *United States* v. *Central Pac. R. R. Co.*, 118 U. S. 235, 240; *United States* v. *Hosmer*, 9 Wall. 432.

A statute will not be given a retrospective operation, unless by its plain terms that result is rendered imperative. *White* v. *United States*, 191 U. S. 542, 552; *United States*

v. *Heath*, 3 Cranch, 399, 408; *Twenty per cent. Cases*, 20 Wall. 179, 187; *Reynolds* v. *McArthur*, 2 Pet. 434.

It will never be given such an effect so as to destroy vested rights. *United States* v. *Chew Heong*, 112 U. S. 536, 559; *Twenty per cent. Cases*, 20 Wall. 179, 187; *Davis* v. *Bohle*, 92 Fed. Rep. 325, 328.

All general terms in statutes should be limited in their application so as not to lead to injustice or oppression or any unconstitutional operation if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature. *Carlisle* v. *United States*, 16 Wall. 147, 153; *Trinity Church* v. *United States*, 143 U. S. 457, 460; *United States* v. *Kirby*, 7 Wall. 482; *Kennedy* v. *Gibson*, 8 Wall. 498, 506; *Taylor* v. *United States*, 207 U. S. 120, 125; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The right of immunity when acquired is a vested right. *Society &c.* v. *New Haven*, 8 Wheat. 461, 494; *Twenty per cent. Cases*, 21 Wall. 179, 187; *Moore* v. *State*, 43 N. J. Law, 203, 227, 256; *Commonwealth* v. *Duffy*, 96 Pa. St. 506, 514; *State* v. *Sneed*, 25 Texas Rep. (Supp.) 66; *State* v. *Keith*, 63 N. Car. 140, 144.

Defendant was examined as one of the officers of the bankrupt company, and *pro hac vice* was the bankrupt, and entitled to the immunities guaranteed by the section. *In re Alpine Cotton Co.*, 131 Fed. Rep. 824; *In re Royce Dry Goods Co.*, 133 Fed. Rep. 100, 106.

The evidence was insufficient to justify the submission of any of the assignments of perjury, and it was error to deny the defendant's motion to take the case from the jury and for the direction of an acquittal.

Mr. Assistant Attorney General Denison, with whom *Mr. Francis H. McAdoo* was on the brief, for the United States:

Section 860, Rev. Stat., was repealed before the trial

and does not apply; but neither it nor § 7a–9 of the Bankruptcy Act gave any privilege against the use of the fact of self-contradiction as part of the proof of perjury.

Section 860 was repealed without a saving clause before petitioner's testimony was used against him, and therefore afforded no protection. *Balt. &c. R. R. Co.* v. *Grant*, 98 U. S. 398; *Ewell* v. *Daggs*, 108 U. S. 143, 150; *Hopt* v. *Utah*, 110 U. S. 574; *Kans. P. R. Co.* v. *Twombly*, 100 U. S. 78, 81; *McNulty* v. *Batty*, 10 How. 72; *Re Hall*, 167 U. S. 38; *South Carolina* v. *Gaillard*, 101 U. S. 433; *Wilkinson* v. *Nebraska*, 123 U. S. 286; Cf. *Legal Tender Cases*, 12 Wall. 457.

There is no such immunity.

The immunity granted by § 7a–9, of the Bankruptcy Act does not prevent the Government from using the bankrupt's testimony to prove other points of the charge than the mere text of the false statement itself. *Daniels* v. *United States*, 196 Fed. Rep. 459; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *Glickstein* v. *United States*, 222 U. S. 139; *United States* v. *Brod*, 176 Fed. Rep. 165; Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391; *United States* v. *Smith*, 47 Fed. Rep. 501.

Nor does it prohibit the admission of testimony before the commissioner to sustain the charge before the referee, and *vice versa*, since both examinations were part of the same proceeding. *Powers* v. *United States*, 223 U. S. 303.

The evidence supported the verdict.

The examination by the commissioner as special examiner was duly authorized, and the false testimony there was perjury.

The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of 1841 and 1867 and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. Rep. 332, but see Judge Buffington's dissent, and see

also *Ex parte Bick*, 155 Fed. Rep. 908; *Ex parte Lee*, 15 Fed. Cas. 8,178; *In re Fixen*, 96 Fed. Rep. 749; *In re Fleischer*, 151 Fed. Rep. 81; *In re Salkey*, 21 Fed. Cas. 12, 252; *United States* v. *Wechsler*, 16 Am. B. R. 1; *United States* v. *Liberman*, 176 Fed. Rep. 161; 10 Columbia Law Rev. 70; 23 Harvard Law Rev. 221; Loveland, Bankruptcy (3d ed.), § 204.

Even under § 21a the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed. *In re Fleischer*, 151 Fed. Rep. 81, *supra*.

Independently of § 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by § 2 (15), and the concluding paragraph of the section. *Blake* v. *Francis-Valentine Co.*, 89 Fed. Rep. 691; *In re Cohen*, 136 Fed. Rep. 999; *In re Lacov*, 142 Fed. Rep. 960; *In re Levi and Klauber*, 142 Fed. Rep. 962; *In re Union Trust Co.*, 122 Fed. Rep. 937; *White* v. *Schloerb*, 178 U. S. 542.

This construction, being therefore possible, both under § 21 (a) and under the general equity power, should be accepted, because the other view leads to the result that no witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication. See *Craddock-Terry Co.* v. *Kaufman*, 175 Fed. Rep. 303; *In re Fleischer*, 151 Fed. Rep. 81; *United States* v. *Liberman*, 176 Fed. Rep. 161. See also Sen. Rep. No. 502, 61st Cong., 2d Sess. on H. R. 16367 to repeal § 860, Rev. Stat.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. The case concerns a prose-

cution commenced in the Circuit Court of the United States for the Southern District of New York by the finding of two indictments against the petitioner herein charging perjury in a bankruptcy proceeding. Upon trial the defendant, Cameron, was convicted and sentenced and upon writ of error the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals. 192 Fed. Rep. 548.

The first indictment, after setting forth the proceedings in bankruptcy against the Knickerbocker Piano Company, of which the defendant was president and treasurer, alleged that he, upon inquiry under oath before a special examiner and commissioner, appointed under § 21a of the Bankruptcy Act, prior to adjudication, testified:

"First. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy, against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.

"Second. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.

"Third. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith, eight pianos for the sum of six hundred and sixty-eight dollars."

And it alleged that the defendant thereby committed perjury.

By the second indictment the defendant is said to have committed perjury in a proceeding before the referee in testifying:

"First. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith and had never known the said address.

"Second. That he, the said Albert B. Cameron, had

had a conversation or conversations with the said William C. Smith in regard to his, the said William C. Smith's buying pianos of and from the said alleged bankrupt."

The two indictments were consolidated and, the defendant pleading not guilty, trial was had and a verdict of guilty returned upon which judgment was rendered.

The petitioner contends that the Bankruptcy Act does not authorize the proceeding before the commissioner prior to the adjudication. The record discloses that a receiver had been duly appointed of the assets and effects of the bankrupt and that he had applied to the court under § 21a of the Bankruptcy Act of 1898 for an order requiring the bankrupt, its officers and directors, to appear before a special examiner and commissioner to be examined concerning the property of the bankrupt and the acts and conduct of its officials. The court made the order requested and appointed the special examiner and commissioner, before whom Cameron appeared and testified, giving, in the course of his examination, the testimony charged in the first indictment to be false. This proceeding was prior to the adjudication in bankruptcy, which followed a few days later. Whether the examination of Cameron upon oath at that stage of the proceedings was authorized by the Bankruptcy Act depends upon a construction of clause *a*, § 21, of the act, which provides, in part, as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

The controversy is over the meaning of the phrase, "a bankrupt whose estate is in process of administration under this act." The construction of this provision dif-

fers in the Federal courts, some of them having held that there can be no such examination until after adjudication, as it is only then that the bankrupt can be subjected to such proceeding. Of this class are *Skubinsky* v. *Bodek*, 172 Fed. Rep. 332; *Podolin* v. *McGettigan*, 193 Fed. Rep. 1021; *In re Thompson*, 179 Fed. Rep. 874; *In re Davidson*, 158 Fed. Rep. 678; *In re Crenshaw*, 155 Fed. Rep. 271. To the opposite view are *In re Fixen*, 96 Fed. Rep. 748; *In re Fleischer*, 151 Fed. Rep. 81; *Ex parte Bick*, 155 Fed. Rep. 908; *Wechsler* v. *United States*, 158 Fed. Rep. 579; *United States* v. *Liberman*, 176 Fed. Rep. 161. We are of opinion that the estate was in process of administration at the time when the examination before the commissioner was ordered and the testimony of Cameron given. This court has decided that the filing of the petition in bankruptcy operates to place the property of the alleged bankrupt *in custodia legis* and prevents any creditor from attaching it; and, although by the terms of the act the estate does not vest in the trustee until the date of the adjudication, it is placed at the time of the filing of the petition under the control of the court with a view to its ultimate distribution among creditors. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; and see *Mueller* v. *Nugent*, 184 U. S. 1, 14; *Everett* v. *Judson*, 228 U. S. 474, 478, 479. And this is true, notwithstanding, as contended by the petitioner, that should the attempt to obtain an adjudication of bankruptcy fail upon the subsequent hearings, the receivership would necessarily be vacated and the property turned back to the alleged bankrupt.

In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed

until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examination of bankrupts was emphasized in *In re Fleischer*, *supra*. By subdivision 9 of § 7 of the act, it is provided that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate." Here is found authority to examine the bankrupt at such other times than the first meeting of creditors as the court may direct. This section should be read with § 21a, and throws light upon its proper construction. In this case the petitioner had invoked the jurisdiction of the court, a receiver had been appointed to take possession of the property, the court was so far in possession of it as to prevent other courts from seizing it and thus defeating the bankruptcy jurisdiction. We are of opinion that the estate was then in process of administration and the examination ordered was within the jurisdiction of the court.

Other questions in the case relate to alleged violations of immunity afforded the defendant under statutes of the United States, which were invoked by him at the trial in the Circuit Court. Records were there offered in evidence showing the testimony given by Cameron before the examiner and before the referee. Cameron claimed that this testimony was incompetent for the purpose of establishing his guilt beyond showing that it was in fact given.

Counsel for petitioner relies upon the immunity clause of § 7 of the Bankruptcy Act, and upon § 860 of the Revised Statutes in force at the time the testimony was given but repealed by the act of May 7, 1910, c. 216, 36 Stat. 352. Section 7, subdivision 9, of the Bankruptcy Act, cited above, concludes, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding." This section was before this court, so far as the immunity provided is concerned, in *Glickstein* v. *United States*, 222 U. S. 139, where it was held not to prevent a prosecution for perjury in the giving of testimony by a bankrupt, and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. In the opinion in that case *Edelstein* v. *United States*, Circuit Court of Appeals for the Eighth Circuit, 149 Fed. Rep. 636, which had held that the words "any criminal proceeding" in which immunity is provided are limited to such criminal proceedings as arise out of the conduct of the bankrupt's business or the disposition of his property, etc., concerning which he may be examined, was cited with approval. In *Ensign* v. *Pennsylvania*, 227 U. S. 592, 600, it was held that full effect could be given to the immunity provision by confining it to the testimony given under subdivision 9, to which it was immediately subjoined. As the present prosecution was based upon alleged false swearing in the course of the bankruptcy proceedings, § 7 of the Bankruptcy Act can have no application.

Petitioner also invokes the protection of § 860 of the Revised Statutes, which reads:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any Court of the United States, in any criminal proceeding, or for the enforcement of any

penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The Government contends that the subsequent repeal of this section deprives the petitioner of the immunity afforded. We cannot agree with this contention. It would be subversive of principles of right and justice to give such effect to a statute upon the protection of which the petitioner had the right to rely at the time when called upon to testify in the bankruptcy court and in consequence of which he may be presumed to have given his testimony. A retrospective operation of statutes is not to be given except in clear cases unequivocally evidencing the legislative intent to that effect. *Union Pacific R. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199, and previous cases in this court cited in the opinion in that case. *Summers* v. *United States*, 231 U. S. 92. In the absence of a clearly expressed legislative intent to the contrary the court will presume that the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. *White* v. *United States*, 191 U. S. 545, 552.

The Circuit Court of Appeals in the instant case was of opinion that the petitioner was entitled to the immunity afforded in § 860 of the Revised Statutes, but failed to find in the record any instance of its violation. Section 860 by its express terms does not exempt a party from prosecution for perjury committed in testifying in the instances named. It was held in *Glickstein* v. *United States*, *supra*, of § 7 of the Bankruptcy Act, that this immunity was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that

it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made. While this is true, the statute by its terms protects the party from the use of such testimony in any court of the United States in any criminal proceeding.

The subsequent prosecution of Cameron for perjury in the two bankruptcy proceedings was a criminal proceeding in a court of the United States and the testimony given in the one bankruptcy proceeding, not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding. In this case it will be noted from the statement already made, that the indictment based upon the testimony before the referee charged that Cameron falsely swore that he had not been able to obtain and had never known the address of William C. Smith, the man with whom it was charged the fraudulent transactions regarding the pianos were had. In the first indictment based upon the testimony before the commissioner, there is no such charge. The Government having put in evidence the proceedings before the referee showing that Cameron there testified that he did not know Smith's address and that he was not acquainted with his friends and that he did not know any one who knew him, the record of Cameron's testimony before the commissioner was offered in evidence, and, over specific objections calling attention to the lack of such charge in the first indictment based on the proceedings before the commissioner, the Government was permitted to read:

"'Q. Did you shortly prior to the filing of the petition sell some pianos and realize cash on them?

"'A. Yes, I did.

"'Q. To whom were they sold?

"'A. They were sold to W. C. Smith.

"'Q. Where is his place of business?

"'A. He is not in business.

"'Q. Who is he?

"'A. Why, an acquaintance of mine.

"'Q. Where does he live?

"'A. On St. Nicholas Avenue, I don't recall the address.

"'Q. What number?

"'A. I don't remember.

"'Q. Between what streets?

"'A. Above 125th.

"'Q. Is it an apartment or a private house?

"'A. Why, I think just a furnished room, or rooms.'

"Mr. McManus: I object to this as immaterial and not within the issues. There is no allegation in the indictment, or the assignment of perjury, as to the alleged address of William C. Smith, and in the proceedings before the Commissioner—

"Mr. Smith: I am reading so the jury will get some sort of a comprehensive idea as to what the man testified to. This is the beginning of this alleged transaction with William C. Smith.

"The Court: Cut it down closer.

"Mr. Smith: I have cut it down to about two pages.

"Objection overruled. Exception by defendant.

"Mr. Smith (reading):

"'Q. How long have you known him?

"'A. Oh, three or four years.

"'Q. Do you know whether he is employed by anybody?

"'A. Yes, sir, but I don't know where.

"'Q. You haven't any idea in what capacity he is employed?

"'A. No.

"'Q. How often do you meet him?

"'A. Not very often.

"'Q. How often did you meet him before this last transaction?

"'A. Oh, two or three times.

"'Q. How long do you know him?
"'A. Three or four years, I think.'
"Mr. McManus: This is another line, subject to the last exception.
"'Q. Where did you first meet him?
"'A. New York.
"'Q. Where?
"'A. I don't recall that.
"'Q. Do you know anybody else other than yourself who knows Mr. Smith?
"'A. He has a number of friends.
"'Q. Do you know of anybody?
"'A. My brothers.
"'Q. Outside of your family?
"'A. No.
"'Q. Is he related to you?
"'A. No.
"'Q. Is he related to any member of your family?
"'A. No.
"'Q. Do you know how he can be located?
"'A. Why, yes, I could get hold of him.
"'Q. How could you get hold of him to-day?
"'A. I'd go and ask my brother.
"'Q. You think he could give you the address?
"'A. Yes, sir, I think so.
"'Q. Did you send to Mr. Smith to come to the place and buy some pianos?
"'A. I had to sell some pianos to get some money.
"'Q. Where did you send to get him?
"'A. I got him through my brother.'"

The effect of this testimony was to distinctly contradict the testimony which Cameron had given before the referee and which was the subject-matter of the indictment based on the proceedings before that officer. It did not tend to establish the charge growing out of his testimony before

the commissioner, which related solely to the sale of pianos and conversations between Cameron and Smith concerning the sales. The district attorney contended that this testimony was competent in order that the jury might get some sort of comprehensive idea as to what the man testified to, and, in view of that statement and the expressed view of the court that anything that threw light on the event was admissible, the testimony was admitted. It is contended that it was competent as showing the relations of Cameron to Smith and to identify Smith, but there was no question in the case as to who Smith was. He was a witness called to establish the charge of perjury and he was the person with whom it was charged the fraudulent dealings in pianos was had by the bankrupt. The testimony offered as to what Cameron swore to before the examiner, while not tending to establish the charge of perjury based upon testimony in that instance, did contradict the testimony which he had given before the referee, and directly tended to establish the charge under that indictment. We think to permit the use of the testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in § 860 of the Revised Statutes, then in force.

Other errors are alleged, and it is contended that there was no adequate proof of the charges made, but these questions were submitted to the jury and cannot be reexamined here. We are of the opinion that error was committed in the use given to the testimony taken before the commissioner in the manner we have stated and for that reason the judgment of the Circuit Court of Appeals affirming the conviction of Cameron in the court below should be reversed.

Reversed and remanded to the District Court of the United States for the Southern District of New York.